No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

The appellee-petitioner, Sylvester Middlebrooks, Jr., filed in the District Court of the United States, Southern District of California, Central Division, on November 21, 1949, a petition for a writ of habeas corpus [R. p. 2] against the appellant-respondent, John D. Ross, Sheriff of Santa Barbara County, State of California.

Summary of Petition.

The petition alleges in Paragraph I [R. p. 2] that the appellee was unlawfully imprisoned, detained and restrained of his liberty by the appellant, by virtue of warrant for extradition signed by the Honorable Earl Warren as Governor of the State of California.

Paragraph II(1)(a) [R. pp. 2, 3 and 4], in substance, alleges that the conviction of appellee and sentences which were imposed on burglary charges by the Superior Court of Bibb County, Georgia, were null and void, for the reason that his conviction was in violation of the due process clause of the Fourteenth Amendment of the Constitution, in that he was denied assistance of counsel. It is contended, furthermore, that he did not plead guilty, but was summarily convicted and sentenced after having been denied a trial.

Paragraph II(1)(b) [R. pp. 4, 5, 6] alleges that the judgment and sentence imposed upon him by the Georgia court violated the due process clause of the Fourteenth Amendment, in that it imposed upon him cruel and unusual punishment.

Paragraph II(2) [R. pp. 6, 7] contends that a violation of the due process clause would occur by appellee being returned to the State of Georgia, to effectuate a sentence of cruel and inhuman punishment; further, that appellee would be in grave danger of violence and possible loss of his life.

Paragraph II(3) [R. p. 7] alleges that the action of the Governor of California in issuing the warrant, and the action of the Sheriff under the warrant, is a violation of the due process clause of the Federal Constitution.

Paragraph II(4) [R. p. 7] alleges that the appellee's presence in the State of California was not due to his voluntary act, but compulsion by the United States Army, who transported him involuntarily to Camp Cooke from another state.

Paragraph II(5) [R. p. 8] alleges that the appellee was once in jeopardy for the same crimes for which he was convicted on or about the 8th day of February, 1935.

Paragraph II(6) [R. p. 8] alleges that prior applications for writs of habeas corpus were made to the Superior Court, the District Court of Appeal, and the Supreme Court of California, and that each of such applications was denied.

Paragraph II(7) [R. p. 8] alleges that applications for stay of execution were made to the Supreme Court of California and the Supreme Court of the United States for the purpose of allowing appellee to file a petition for a writ of certiorari to the Supreme Court of the United States and that each of these applications was denied.

Summary of Return to Writ.

Appellant-respondent, John D. Ross, Sheriff of Santa Barbara County, California, filed a return [R. pp. 12 to 14 incl.] which alleged the following:

Paragraph I [R. p. 12] alleged, in substance, that the appellee was held in custody by the appellant Sheriff under and by virtue of a fugitive warrant issued by the Governor of California, and a true copy of such warrant was annexed to the return and marked Exhibit 1 [R. pp. 14, 15].

Paragraph II of the return [R. pp. 12, 13] alleged that the Governor of the State of Georgia made a written demand for the extradition of appellee as a fugitive from justice from the State of Georgia, the demand being accompanied by certain documents, including the indictment, judgments of conviction and other supporting papers certified as authentic, a true copy of such demand and accompanying written documents being annexed to the return and marked Exhibit 2 [R. pp. 16 to 40, incl.].

Paragraph III of the return [R. p. 13] denies, for lack of information or belief, the allegations of Para-

graphs I, II(1), (a), (b), (2), (3), (4), (5), and (7) of the petition.

Paragraph IV of the return [R. pp. 13, 14] raised the issue that the petition for a writ did not state facts sufficient to constitute a cause of action against the appellant, and a memorandum of points and authorities was filed in support of this issue.

Summary of Traverse.

Appellant stipulated [R. p. 107] that the matter set forth in the return of the Sheriff could be considered denied by the petitioner. The Court ruled, however, as follows [R. pp. 107, 108]:

> "The Court: The stipulation that they be denied is all right as far as it goes. But as to any affirmative matters, the court will treat the petition as the traverse. That has been the practice around here. It raises the same issues and your record then is in proper shape."

Summary of Proceeding.

The proceeding came on for hearing before the Honorable James E. Carter, District Judge of the United States of America, Southern District of California, Central Division, on the 20th day of December, 1949. The Court took the matter under submission after the introduction of testimony and evidence, arguments of counsel and submission of briefs. The Court, thereafter, on February 3, 1950, rendered its decision and opinion in favor of the appellee [R. pp. 45 to 77, incl.] and directed appellee to submit findings of fact, conclusions of law

and judgment, for the approval of the Court. On February 7, 1950, the Court ordered the release of appellee on bond [R. pp. 78 to 80, incl.] prior to the approval of findings and entry of judgment and pending any appeal of the case upon the entry of judgment in the proceeding. On May 2, 1950, the District Court approved findings of fact, conclusions of law and entered judgment in favor of the appellee and ordered the discharge of the appellee from the custody of the appellant Sheriff.

Appellant upon the entry of judgment on May 2, 1950, in the proceedings, filed in the District Court on the 8th day of May, 1950, an application for the issuance of a certificate of probable cause for an appeal [R. pp. 94 to 100, incl.]. The District Judge, James E. Carter, who had rendered the judgment in the proceedings, thereupon issued, on the 8th day of May, 1950, a certificate of probable cause on appeal [R. pp. 100, 101]. Appellant thereupon filed in the District Court, in and for the Southern District of California, Central Division, on the 11th day of May, 1950, a notice of appeal [R. p. 102], filed also on the 12th day of May, 1950, notice of the contents of the record to be prepared [R. pp. 103, 104] and paid all required fees and furnished a bond securing the cost of preparation of the record.

Appellant filed with the Clerk of the United States Court of Appeals for the Ninth Circuit notice of the contents of the record to be printed [R. pp. 225, 226], and filed a statement of points on appeal [R. pp. 227 to 237, incl.], and paid all required fees and estimated costs of printing the record.

The jurisdiction of District Courts of the United States to issue writs of habeas corpus is set forth in subdivision (a) of Section 2241 of Title 28, U. S. C. A., which reads as follows:

> "2241. Power to grant writ.
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

The appellate review of the final order of a district judge in a habeas corpus proceeding is provided for in the following designated statutory provisions.

Section 1291 of Title 28, U. S. C. A., reads as follows:

> "1291. Final decisions of district courts.
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 2253, Title 28, U. S. C. A., reads as follows:

> "2253. Appeal.
>
> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to

review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right of appeal from such order in a proceeding to test the validity of a warrant of removal issued pursuant to section 3042 of Title 18 or the detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

George F. Langsdorf, Librarian, Ninth U. S. Court of Appeals, in an article entitled "Habeas Corpus and Protean Writ and Remedy," cited in 8 F. R. D. 179, 189-190, discussed the origin and changes made in Federal statutory provisions for appellate review of habeas corpus proceedings. At page 190 the writer said:

"'All final decisions' by district courts, including of course those in habeas corpus cases when heard on the writ and return, are appealable to the proper Court of Appeals, save those appealable directly to the Supreme Court (28 U. S. C. A. Sec. 225(a), now become Revised 28, U. S. C. A., Sec. 1291). The great change effected by creation of a right of appeal in these terms was to elevate the issuance or refusal of the writ into a proceeding and order having finality for purpose of review. . . ."

Abstract of Statement of Case Presenting the Questions Involved and the Manner in Which They Are Raised.

The Governer of California on the 13th day of September, 1949, issued his warrant authorizing the arrest of appellee, Sylvester Middlebrooks, Jr., as a fugitive from justice of the State of Georgia [Respondent's Exhibit 1 attached to the return, R. pp. 14, 15]. Appellant, John D. Ross, Sheriff of Santa Barbara County, State of California, thereupon apprehended and took into custody on the 21st day of September, 1949, the appellee.

The fugitive warrant of the Governor of California was issued pursuant to the receipt of a written demand by the Hon. Herman E. Talmadge, Governor of the State of Georgia, certified by him as authentic, for the extradition of appellee as a fugitive from justice from the State of Georgia. The demand [R. pp. 16, 17] was accompanied with the following papers:

(1) Application for extradiction to the Governor of Georgia by the State Board of Corrections by its chief clerk [R. pp. 18 to 21, incl.]. This authenticated document recites, in part:

> ". . . That Sylvester Middlebrooks was convicted at the February (1935) term(s), Bibb County Superior Court(s), State of Georgia, a Court (or Courts) having jurisdiction thereof, of Burglary (5 counts) and was sentenced thereupon by the Hon. W. A. McClellan, Judge presiding, to One to One year in each of Five (5) Counts, one to follow the other in the penitentiary of Georgia.
>
> "By virtue of said sentence(s) the said Sylvester Middlebrooks was received in the penitentiary February 8th, 1935, and while confined in said penitentiary

escaped from Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, on July 13, 1939 and fled the State and is now a fugitive from justice and has been recaptured and is being held by Police Department, Camp Cooke, California under the name of Sylvester Middlebrooks . . ."

(2) An indictment by the Grand Jury of Bibb County, Georgia, during the November 1934 term, charging Sylvester Middlebrooks, Jr., with five counts of burglary [R. pp. 21 to 28, incl.].

(3) Five judgments of conviction of appellee and sentences imposed on a plea of guilty to each of the five counts of the indictment [Respondent's Exhibit 2, R. pp. 28 to 40, incl.].

The demand of the Governor of Georgia filed with the office of the Governor of California [R. pp. 16, 17] certified to the correctness of all above referred to documents.

The indictment discloses that the appellee summarily waived arraignment and plead guilty under each of the counts of the indictment on February 8, 1935 [last page of indictment, R. p. 27].

The authenticated judgments of conviction and sentences imposed involving each count of the indictment also show that he pleaded guilty on February 8, 1935, and was thereupon committed for one year on each of the five counts, to run consecutively.

The demand and supporting papers filed by the Governor of Georgia bear the approval under date of September 6, 1949, of Frederick N. Howser, Attorney General of the State of California, by a named deputy.

Appellee escaped confinement, according to his testimony, on or about the year 1937 and went to South

Carolina where he was arrested and convicted of a felony in Columbus, South Carolina, on charges of house-breaking and grand larceny and sentenced to a chain gang [R. p. 159]. Upon completion of his sentence in South Carolina he was again arrested by the Georgia authorities for completion of the sentence on the five burglary charges [R. p. 160]. While so confined he again escaped from the Walton County Public Works Camp, Monroe, Georgia, a branch of the Georgia penitentiary, July 13, 1939, and fled the State of Georgia [Exhibit 2 attached to return, R. p. 18], and admission of appellee of escape [R. p. 161]. Appellee subsequently enlisted in the Army of the United States, deserted and three and one-half years after the desertion was apprehended and court-martialed. The sentence imposed was 15 years, but was subsequently reduced to a sentence of approximately 41 months [R. pp. 161, 162].

It was while so confined in the U. S. Disciplinary Barracks at Camp Cooke, California, that the Governor of Georgia made a formal request of extradition in accordance with Article IV, Section 2, Clause 2, of the Constitution of the United States, in the form and manner provided by the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) (for the arrest of appellee as a fugitive from justice of the State of Georgia), and in conformance with Section 1548.2 of the Penal Code of California, one of the provisions of the Uniform Extradition Act.

Appellee, upon his being taken into custody by the appellant Sheriff of Santa Barbara County, California, under authority of the fugitive warrant issued by the Governor of California, then filed a petition for a writ of habeas corpus in the County of Santa Barbara, and,

after hearing, the writ of habeas corpus was denied. Thereafter he filed applications for writs in the District Court of Appeal of California and the Supreme Court of California and the applications were denied. Appellee then sought a stay of rendition from the California Supreme Court, which was refused [R. p. 206]. Applications for similar stays of execution were similarly made to the Hon. William O. Douglas, Justice of the U. S. Supreme Court, and Hon. Hugo L. Black of the U. S. Supreme Court, which were denied [R. p. 207].

Appellee then on November 21, 1949, made application to the District Court of the United States, Southern District of California, Central Division, for a writ of habeas corpus [R. p. 2].

The petition sought a hearing and determination by the District Court on issues involving the constitutional validity of the phases of the penal action and proceedings by the demanding state, Georgia, in respect to the fugitive appellee and his conviction for offenses in that state, in addition to the validity of punishment inflicted and allegedly threatened by the demanding state. The petition has heretofore been summarized in detail in the statement of the pleadings. The petition fails to allege that appellee was not charged with crime in the demanding state or that appellee was not a fugitive from the demanding state.

The return of the appellant Sheriff alleged the custody of appellee under authority of the warrant issued by the Governor of California on demand of the Governor of Georgia.

Paragraph IV of the return requested the dismissal of the petition for a writ for the reason the petition did not state facts sufficient to constitute a cause of action upon which relief could be granted. Motions requesting the discharge of the writ were also made on this ground and

also on jurisdictional grounds, during the trial, which will be referred to in our specifications of errors. Likewise, appellant objected to the introduction of testimony and evidence offered and received on such above referred to grounds, and also motions to strike such testimony and evidence were made on behalf of appellant during the trial. The specifications of error will refer in detail to such matters. All such motions and objections and motions to strike were taken under submission by the Court and subsequently overruled by paragraph 15 of the Court's conclusions of law [R. p. 92]. The Court rendered its opinion on February 3, 1950, in favor of the appellee, and subsequently, on May 2, 1950, approved findings of fact and conclusions of law, and entered judgment which ordered the discharge of the appellee from custody of the appellant Sheriff.

The District Court in this proceeding refused to test the asylum state's arrest and detention of petitioner for extradition purposes within the established scope of inquiry rule applicable to extradition proceedings. The Court, on the other hand, assumed jurisdiction to test the validity of the proceedings of the Georgia court with respect to the appellee and his offenses, and to test the validity of the punishment imposed, and contemplated incarceration if returned to the demanding state to complete the terms of his conviction for such offenses.

The effect of the failure of the Court to apply the limited scope of inquiry rule to this rendition matter was the commission of error by the Court in nullifying the operating effectiveness of Article IV, Section 2, Clause 2, of the Constitution of the United States, the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) and the following provisions of the Penal Code of California: Sections 1548.2, 1549.2, 1549.3

and 1553.2,* which are provisions of the Uniform Extradition Act in force and effect in California.

The first basic question involved on this appeal, therefore, is as follows: Did the District Court properly interpret and construe the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.) and provisions of the Penal Code of the State of California, Sections 1548.2, 1549.2, 1549.3 and 1553.2, in hearing and determining the constitutional validity of the penal action by the demanding state in respect to the appellee and his offenses and punishment therefor. Appellant's first specification of error bears upon this question, and errors in six subdivisions have been designated, which arise by reason of the non-acceptance and violation by the Court of the limited scope of inquiry rule applicable to extradition proceedings. Argument No. 1 pertains to this specification of error.

The second question involved on this appeal is whether at the rendition stage relief to appellee was available in the District Court on the issues presented by the petition without first having exhausted the remedies of the demanding state, Georgia. The second specification of error and argument thereto bears upon this question.

The third question involved on this appeal is whether certiorari to the United States Supreme Court from a judgment by the Supreme Court of California denying relief to appellee was a prerequisite to adequately exhausting the remedies of the asylum state, California. Appellant's third specification of error and argument has reference to this question.

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*(All such designated provisions are quoted in full in the Appendix to this brief.)

SPECIFICATIONS OF ASSIGNED ERRORS RELIED UPON AND REFERENCE TO THE RECORD WHERE SUCH ASSIGNMENTS APPEAR.

I.

The District Court Erred in Hearing and Determining in the Asylum State the Constitutional Validity of Phases of the Penal Action by the Demanding State in Respect to the Fugitive and His Offenses.

Errors in this category are listed in six subdivisions, as follows:

Subdivision 1.

The judgment of the Court based upon the Court's findings of fact and conclusions of law ordering that petitioner be unconditionally released from custody [R. p. 93] was contrary to law, by reason of the Court's non-acceptance and violation of the limited scope of inquiry rule applicable to rendition matters as determined by the Supreme Court of the United States, based upon construction and interpretation of the requirements of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions.

The scope of inquiry of a petition for a writ of habeas corpus in cases having an extradition base is limited under authority of such named provisions to the following questions: (a) Whether the person demanded has been substantially charged with crime, and (b) whether he is a fugitive from justice of the demanding State.

Subdivision 2.

The District Court erred in overruling the motion of appellant to discharge the writ on the ground that the petition did not state facts sufficient to constitute a cause of action against the appellant Sheriff of Santa Barbara County, California, by reason of failure of said District Court to apply the rule limiting the scope of inquiry for extradition purposes.

Record, page 120, discloses the following motion on behalf of appellant at the close of counsel for appellee's opening statement:

> "Mr. Thomas: At this time the respondent sheriff, your Honor, will move the court to discharge, dismiss the writ issued in this case, on the ground that the petition for a writ and counsel's opening statement, neither, state facts sufficient to constitute a cause of action.
>
> "If I may at this time, your Honor, I would like to discuss authorities dealing with the matter."

The Court did not rule on this motion, but took the same under submission, and overruled same in paragraph 15 of the Court's conclusions of law [R. p. 92].

Counsel for appellee's opening statement [R. pp. 108 to 120, incl.] summarizes allegations of the petition to the effect that there were deprivations of alleged constitutional rights committed by the courts and penal system of the demanding State. No issue was raised in the opening statement contending that appellee was not charged with crime in the demanding State, that appellee was not the person named in the rendition papers, that appellee was not present in the demanding State at the time of the commission of the alleged offenses, or that appellee was

not a fugitive from the State of Georgia within the established definition of a fugitive from justice.

Paragraph IV of the return [R. pp. 13, 14] raised the same issue, and reads as follows:

> "That I, John D. Ross, Sheriff of Santa Barbara County, California, do make the further return that the petition for a writ does not state facts sufficient to constitute a cause of action against this respondent. Your attention is respectfully directed to the Memorandum of Points and Authorities in Opposition to the Petition for Writ of Habeas Corpus filed on behalf of respondent with respect to the points involved."

Subdivision 3.

The District Court also erred in overruling appellant's objections to the introduction of testimony and evidence offered by appellee, by reason of failure to apply the rule of limiting the scope of inquiry for extradition purposes.

Appellant objected to the testimony of Sylvester Middlebrooks, Jr., appellee, upon his being called to testify [R. p. 122], as follows:

> "Mr. Thomas: At this time, your Honor, the respondent sheriff will object to the introduction of any evidence on the ground that the petition and counsel's statement, opening statement, do not constitute a cause of action, and the witness' testimony would be immaterial and not bear on any issue involved."

It was stipulated that appellant's objection might go to all testimony from the named witness without having to be repeated. The appellee was thereupon permitted to testify, in summary, as follows:

That he was born February 11, 1917, in Macon, Bibb County, Georgia, where he resided continuously until he

was arrested in 1931 or 1932 on burglary charges and sent to a reformatory by the Juvenile Court [R. pp. 124, 125]. The Court admitted in evidence Petitioner's Exhibit 1, subject to objections of counsel for the appellant [R. p. 126] theretofore made. The exhibit purported to be a certified copy of the juvenile case record of Sylvester Middlebrooks, Jr., and stated at Record, page 127:

> "Testimony of Sylvester Middlebrooks, Jr.
>
> Report of investigation, admits aiding and leading in 8 burglaries—Mrs. Bishop, J. A. Smith, A. W. McClure, J. A. Hunt, Clifford McKay, Mr. Chandler and two houses he pointed out.
>
> Date of hearing, January 7, 1932.
>
> Disposition, committed to Georgia Training School for Boys.
>
> Certified to be a true copy.
>
> /s/ Alice Denton,
> Clerk of Juvenile Court,
> Bibb County, Georgia."

That he remained at the reformatory about 3½ months, escaped and was rearrested and sent to the reformatory again, and again escaped [R. pp. 128, 129]; that in June or July, 1934, he was arrested on the burglary charges involved in an indictment and taken before a judge on February 8, 1935 [R. p. 133]; that he was not represented by an attorney at the proceedings on the indictment [R. p. 135]; that he did not plead guilty [R. p. 136]; that he was not asked by the Court whether he plead guilty or not guilty [R. p. 136] and was sentenced by the Court to 5 years in the Georgia state prison [R. p. 135]; that he was thereupon committed to the Walton County prison at Monroe, Georgia [R. p. 140]; the witness described the

nature of the housing facilities provided at such prison [R. pp. 140, 141]; testified with respect to working conditions [R. pp. 142, 143]; testified regarding the type of food served to inmates [R. pp. 143, 144]; testified that the guards carried guns and sticks [R. p. 145]; that he and other prisoners had been beaten by the guards [R. p. 145]; that shackles were used on the prisoners [R. p. 147]; described sanitary conditions [R. pp. 148 to 150, incl.]; that stocks were used [R. p. 152]; that sweat boxes were used, and details with regard to the use [R. pp. 154 to 156, incl.].

The witness further testified that in March, 1937, he escaped and went to South Carolina [R. p. 159] and was arrested and convicted there of breaking into an inhabited dwelling house [R. p. 159] and was sentenced to 18 months on a South Carolina chain gang [R. p. 159]; that upon completion of his sentence in South Carolina he was again apprehended by the Georgia authorities and taken back to the Walton County chain gang in the year 1938 [R. p. 160]; that after he had been there about a year he again escaped and went to New York [R. p. 161] and enlisted in the Army on April 23, 1942; went A. W. O. L. in August, 1942, for 3½ years [R. p. 161]; that he was court-martialed by the Army authorities in August, 1946, and dishonorably discharged [R. p. 161] and the sentence imposed was 15 years, but was reduced to 41 months [R. p. 161].

The witness further testified that part of his Army sentence was served at Stonewall, New York, and the balance of his sentence was served at Camp Cooke, California [R. p. 165].

The witness further testified that he escaped from the Georgia prison on July 13, 1939 [R. p. 162].

At the completion of the appellee's direct testimony appellant's counsel [R. p. 168] made the following motion:

> "Mr. Thomas: At this time, your Honor, on behalf of the respondent I move to strike the evidence of the witness on the following grounds: The evidence is incompetent, irrelevant and immaterial;
>
> "(2) Neither the petition requesting a writ, nor counsel's opening statement, states sufficient facts to constitute a cause of action which would warrant the granting of a writ;
>
> "(3) That the proffered testimony raises issues which are beyond the scope of the jurisdiction of this Court."

The Court took the matter under submission [R. p. 169].

Horace B. Conkle was then called as a witness on behalf of appellee and, after being duly sworn, the following objection to the testimony was made [R. p. 170], as follows:

> "Mr. Thomas: Just a moment, please. At this time I would like to renew the motion heretofore made with respect to the first witness' testimony, on the ground that neither the petition nor counsel's opening statement states a cause of action which would warrant the granting of a writ.
>
> "The Court: The objection is taken under submission, and by a stipulation of counsel it may go to the entire line of testimony.
>
> "Mr. McTernan: So stipulated."

Horace B. Conkle was thereupon permitted to testify as follows: That he was convicted of the crime of burglary in Georgia in 1934 [R. p. 171]; that he was confined, following his sentence, in Colquitt County prison, Georgia [R. p. 172]; described the housing facilities at such prison [R. pp. 172 to 175, incl.]; testified as to the use of shackles at such prison [R. pp. 175 to 177, incl.]; testified regarding food conditions in such prison [R. pp. 178 to 179]; testified regarding working conditions at such prison [R. p. 179]; testified regarding the beating of prisoners by guards [R. p. 181]; testified regarding punishment practices [R. pp. 182 to 189, incl.].

Appellant's counsel at the completion of the witness' testimony made a motion to strike, as follows [R. p. 189]:

> "Mr. Thomas: The respondent at this time will move the court to strike the testimony of the witness on the following grounds: that the testimony is incompetent, irrelevant and immaterial to any valid issue before the court; secondly, on the ground that the petition in this case and counsel's opening statement does not state facts sufficient to constitute a cause of action; and, thirdly, the testimony bears upon issues which are beyond the scope of the jurisdiction of this court."

The same named witness, Horace B. Conkle, was permitted to further testify, over objection of appellant [R. p. 191], that after completion of his term of sentence in July of 1939, he returned to the State of Georgia for a visit in 1945 or 1946 [R. p. 191]; that he observed no brutality on this visit [R. p. 192]; that the guards were still armed with shotguns, rifles and pistols [R. p. 192].

At Record, page 192, counsel for the appellant renewed his motion to strike, as follows:

> "Mr. Thomas: We will renew our motion to strike the witness' testimony to the last few questions, your Honor, on the same grounds as heretofore set forth.
>
> "The Court: The motion will be taken under submission."

The appellee then offered in evidence a report as it appeared in the San Francisco News, which purported to be a report of the President's Committee on Civil Rights, according to counsel for appellee. Record, page 199, shows objection on behalf of the appellant, as follows:

> "Mr. Thomas: To which the respondent objects on the ground that the proffered testimony is incompetent, irrelevant and immaterial."

The excerpt makes reference to the killing of eight negro prisoners in the State Highway Camp in Glynn County, Georgia, on July 11, 1947, who were killed as they allegedly attempted to escape. The excerpt stated that the Glynn County Grand Jury exonerated the warden of the camp and four guards of all charges, but makes reference to conflicting evidence presented to the State Board of Corrections in its investigation where one witness testified that the prisoners were not trying to escape [R. pp. 201 to 203, incl.].

Appellant moved to strike such excerpt from the record, as follows [R. p. 203]:

> "Mr. Thomas: At this time respondent moves to strike the excerpts read on the ground that the testimony is incompetent, irrelevant and immaterial.

"The Court: And upon all the other grounds you have previously stated?

"Mr. Thomas: That's right.

"The Court: I will reserve ruling on that motion, too."

The District Court by its conclusion of law No. 15 [R. pp. 92, 93] overruled all objections and motions to strike made by appellant and taken under submission by the Court and not ruled upon during the trial.

The Court thereby erred in failing to apply the rule limiting the scope of inquiry applicable to extradition cases.

Subdivision 4.

The non-acceptance and violation of the scope of inquiry rule by the Court is also the basis of appellant's position on this appeal that the Court erred in the following designated findings of fact and conclusions of law:

The last sentence of Finding of Fact No. 2 [R. p. 83] wherein the District Court construes the rendition proceeding as being one for the purpose of enforcing a judgment and sentence of the Superior Court of Bibb County, State of Georgia, as more particularly described in subsequent findings.

Finding of Fact No. 3 [R. p. 83] finds that the appellee was not represented by an attorney at the proceedings upon the indictment before the Superior Court of Bibb County, Georgia, on February 8, 1935.

Finding of Fact No. 4 [R. p. 84] finds that appellee did not plead guilty to the indictment and was denied a trial by the Superior Court of Bibb County, Georgia [R. p. 84].

Finding of Fact No. 5 and Finding of Fact No. 6 [R. pp. 84, 85, 86] involve a determination by the Court of

nature of punishment sustained by appellee while confined in the Walton County Works Camp of the State of Georgia, a branch of the penitentiary.

Finding of Fact No. 8 [R. p. 86] involves a determination by the Court that if appellee were returned to the State of Georgia upon requisition he would again be subjected to the practices referred to in paragraph 5 of the Findings of Fact. The record is barren of any evidence pertaining to the penal methods and practices in vogue as of the date of the trial on December 20, 1949, or for several years prior thereto.

Finding of Fact No. 12 [R. p. 88] adopts *haec verba*, by reference, all findings of fact contained in the opinion of the Court filed on February 3, 1950.

Conclusion of Law No. 2 [R. p. 89] construes the action of the Governor of California in issuing a warrant for appellee's arrest on the demand of Georgia as State action by California within the meaning of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 3 [R. p. 89] construes the action of the Governor of California in issuing the fugitive warrant as State action by California for the purpose of effectuating the judgment and sentence of the Superior Court of Bibb County, Georgia, on February 8, 1935, and that thereby the State of California became an active participant in the effectuation of said judgment and sentence.

Conclusion of Law No. 4 [R. p. 89] determines that the Superior Court of Bibb County, State of Georgia, failed to afford appellee counsel and thereby deprived him of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 5 [R. pp. 89, 90] determines that the judgment and sentence imposed without a plea of guilty was in violation of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 6 [R. p. 90] and Conclusion of Law No. 7 [R. p. 90] make determination that appellee was subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Conclusion of Law No. 8 [R. p. 90] involves a determination by the Court that the judgment and sentence of the Superior Court of Bibb County, Georgia, was void and without jurisdiction.

Conclusion of Law No. 9 [R. p. 91] construes the action of the State of California as void and without jurisdiction.

Conclusion of Law No. 11 [R. p. 91] involves a determination that the appellee, if returned to Bibb County, Georgia, would be again subjected to cruel, unusual and inhuman punishment, in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States; and that the action of California was void and without jurisdiction and violated the Fourteenth Amendment.

Conclusion of Law No. 12 [R. p. 92] construes the custody of appellee by appellant sheriff, under authority of the fugitive warrant issued by the Governor of California, as void and without jurisdiction.

Conclusion of Law No. 13 [R. p. 92] makes determination that the appellee was entitled to his immediate and unconditional release.

Conclusion of Law No. 14 [R. p. 92] incorporates as if set forth *haec verba* the conclusions of law contained in the opinion of the District Court filed February 3, 1950.

The Court thereby erred in each and all of such above designated findings of fact and conclusions of law, by reason of failing to apply the rule of limiting the scope of inquiry for extradition purposes as required by the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and of the Act of Congress regulating interstate extraditions. (Section 3182, Title 18, U. S. C.)

Subdivision 5.

The District Court erred in nullifying the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U. S. C.), by determining in the asylum state that a fugitive had been deprived of constitutional rights under the Fourteenth Amendment of the Constitution of the United States.

In Part V of the Court's opinion [R. pp. 69, 70] incorporated as a conclusion of law by Paragraph 14 of the Conclusions of Law [R. p. 92] as if set forth *haec verba* in the Conclusions of Law, the District Court erred in determining that the rendition of appellee was violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States. Appellant incorporates by reference, to avoid repetition, the summary of Conclusions of Law as designated in Subdivision 4 of the First Specification of Error wherein, similarly, the Court made determination that the rendition of appellee was vio-

lative of the due process clause. The Court thereby erred in nullifying the operating effectiveness of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions (Section 3182 of Title 18, U. S. C.) by failing to accept and apply the limited scope of inquiry rule applicable to extraditions.

Subdivision 6.

The District Court erred in nullifying the provisions of the California Uniform Extradition Act (Penal Code, Secs. 1548.2, 1549.2, 1549.3 and 1553.2) by determining that a federal court in California may declare that a fugitive from the State of Georgia has been deprived of constitutional rights under the Fourteenth Amendment of the Constitution of the United States in the State of Georgia.

Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California, which are provisions of the Uniform Extradition Act in force and effect in over half of the states of the Union, are adversely affected by the ruling of the District Court, to the extent that the operative effectiveness of such named provisions is nullified by the holding of the Court that such statutes were operative against appellee for unconstitutional purposes and with unconstitutional rights, and in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Part V of the Court's opinion [R. pp. 69, 70], incorporated as a conclusion of law by paragraph 14 of the Conclusions of Law [R. p. 92] as if set forth *haec verba.*

Each of the sections of the California Penal Code referred to are quoted in full in the argument to the first specification of error at pages 39 to 41 of this brief.

Summary of Argument to First Specification of Error.

The demand of the Governor of Georgia, accompanied by the requisite authenticated documents, invoked into operation the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions. (Section 3182 of Title 18, U. S. C.)

Finding of Fact No. 2 [R. pp. 82, 83] involved a determination by the Court that the appellee had been arrested and was being held in custody by the appellant Sheriff of Santa Barbara County, California, under and pursuant to a warrant of arrest issued by the Governor of Georgia, upon written requisition of the Governor of the State of Georgia, certified as authentic; that the requisition was accompanied with a copy of an indictment charging appellee with the commission of five counts of burglarly, a copy of the judgments of conviction and sentence of appellee on each of five counts of burglary, each of which accompanying documents was certified as authentic.

Finding of Fact No. 7 [R. p. 86] acknowledges that the appellee escaped from the Walton County Public Works camp on or about July 13, 1939, and fled the State of Georgia.

The demand of the Governor of Georgia, accompanied by all requisite documents for the extradition of appellee as a fugitive from justice from the State of Georgia, invoked into operation the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California, which are provisions of the Uniform Extradition Act, in

aid of the Act of Congress regulating interstate extraditions.

The scope of inquiry in an application for *habeas corpus* in cases having an extradition base for testing asylum state's arrest and detention for extradition purposes is limited to the following questions: (1) whether the person demanded has been substantially charged with a crime in the demanding state, and (2) whether he is a fugitive from justice of the demanding state.

The District Court refused to test the asylum state's arrest and detention for extradition purposes within the scope of inquiry applicable to such proceedings and proceeded to hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses.

The failure of the Court to apply the well established limited scope of inquiry rule applicable to extradition proceedings resulted in a nullification of the operating effectiveness of the provisions of Article IV, Section 2, Clause 2 of the Constitution of the United States and the Act of Congress regulating interstate extraditions.

The Court erred in determining that Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California were operative against appellee for unconstitutional purposes and with unconstitutional results and violated the due process clause of the Fourteenth Amendment.

Argument to Specification of Error No. 1.

The Court erred in hearing and determining in the asylum state the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive and his offenses. The argument on this specification of error is applicable to subdivisions 1 to 6, inclusive, of the first specification of error and, for brevity's sake, such subdivisions are not at this point repeated.

1.

The demand of the Governor of Georgia, accompanied by all requisite authenticated documents, invoked into operation the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions (Sec. 3182 of Title 18, U. S. C.).

Article IV, Section 2, Clause 2, of the Constitution of the United States provides:

> "The person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the state from which he fled be delivered up, to be removed to the State having jurisdiction of the crime."

The return of fugitives is a matter of rightful demand by this provision of the Constitution. The Constitution makes that obligatory which would otherwise have to be based on interstate comity, courtesy, agreement or contract.

The Supreme Court of the United States in *Kentucky v. Dennison,* 24 Howe 66, at page 100, 16 L. Ed. 717,

65 U. S. 66 (1860), in discussing the history and purpose of this constitutional provision said:

> "It is manifest that the statesmen who framed the constitution were fully sensible, that from the complex character of the government, it must fail unless the states mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a state, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the state to repeat the offense as soon as another opportunity offered."

In *Lascelles v. Georgia* (1893), 148 U. S. 537, 542, 37 L. Ed. 549, the Court said:

> "The sole object of the provision of the constitution and the act of Congress to carry it into effect . . . is to secure the surrender of persons accused of crime, who have fled from justice of a state, whose laws they are charged with violating. . . . No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee."

The provisions of the Constitution for extradition, being general only and not self-executing, the duty of providing by law the regulations necessary to carry the provisions into execution devolve upon Congress according to decisions of the Supreme Court of the United States.

> *Commonwealth of Kentucky v. Dennison, supra;*
> *Roberts v. Reilly* (1885), 116 U. S. 80;
> *Innes v. Tobin* (1916), 240 U. S. 127.

The Congress of the United States accordingly enacted legislation to effectuate the constitutional provision by prescribing the acts which were necessary to constitute a valid demand for the extradition of a fugitive. Section 3182, 18 U. S. C. (1948), formerly (1 Stat. 312—1793, Revised Stat. Sec. 5278, 18 U. S. C. Sec. 662), reads as follows:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

The duty of a State to surrender a fugitive is clearly prescribed by the constitutional provision, Article IV, Section 2, Clause 2, when a demand is made by another State in the form and accompanied by the documents referred to in Section 3182, 18 U. S. C.

The Supreme Court of the United States has interpreted the constitutional provision, Article IV, Section 2,

Clause 2, and predecessor sections of Section 3148, Title 18, U. S. C., in clear and unambiguous language. Justice Holmes in the case of *Drew v. Thaw* (1914), 235 U. S. 432, 440, 59 L. Ed. 302, said:

> "When, as here, the identity of the person, the fact that he is a fugitive from justice, the demand in due form, the indictment by a grand jury for what it and the Governor of New York allege to be a crime in that state, and the reasonable possibility that it may be such, all appear, the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculation as to what ought to be the result of a trial in the place where the constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once."

It has been held by the Supreme Court of the United States that the duty to issue a warrant upon receipt of a proper requisition is ministerial (*Kentucky v. Dennison, supra*) and that although there is no authority whereby anyone may compel the Governor to issue his warrant, if he refused to do so, nevertheless the act is not a discretionary one. (*Drew v. Thaw, supra.*)

The Supreme Court of the United States in *Roberts v. Reilly* (1885), 116 U. S. 80, at page 95, interpreted the Congressional Act regulating interstate extraditions as follows:

> "The act of Congress Rev. Stat. 5278 makes it the duty of the executive authority of the state to which such person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an in-

dictment found or affidavit made before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled."

The Supreme Court of the United States interpreted the congressional act regulating interstate extraditions in *Appleyard v. Massachusetts* (1906), 203 U. S. 222. At page 227 the Court said:

"A person charged by indictment or by affidavit before a magistrate with the commission within a state of a crime covered by its laws, and who, after the date of the commission of such crime leaves the state—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution and the laws of the United States, a fugitive from justice, and if found in another state must be delivered up by the governor of such state to the state whoses laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the governor of the state from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any state. The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the state. And while a state should take

> care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

In *McNichols v. Pease* (1907), 207 U. S. 100, the Court at page 112 said:

> "When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

The case of *Johnson v. Matthews,* decided May 1, 1950, 182 F. 2d 677, by the United States Circuit Court of Appeals for the District of Columbia, involves the identical issues as are presented on this appeal. The Court stated in its opinion, at page 679, as follows:

> "The Supreme Court has established the scope of the extradition inquiry and the issues which are presented by it. The state cases and other federal court cases upon the subject are myriad. In essence the rule is that the court may determine whether a crime has been charged in the demanding state, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed.

"The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities, sound theory of government, and the practical aspects of the problem all require that conclusion.

"The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government."

The Court also stated at page 680:

"While the provision of the Constitution, being specific in its reference to 'State,' may not apply to the District of Columbia, the same basic theory underlies the federal statute which clearly does apply. Both Constitution and statute are explicit and mandatory. They require—not merely suggest—that the fugitive, having been secured, be delivered to the demanding state."

We have included the opinion of the Court in *Johnson v. Matthews* in Appendix "B" to this brief commencing at page 4.

The District Court of Appeal of the State of California, Second Appellate District (Division 1), on July 19, 1950, in the case of *In re Backstron aka Scott* (1950), 98 A. C. A. 701, rejected the application of Eugene Backstron, also known as Nathan Scott, for a writ of habeas

corpus. The issues involved were identical with many of the issues presented for a writ in the instant case. The Court, in reviewing the allegations of the petition, said:

> "The petition alleges that petitioner is 'unlawfully restrained of his liberty . . . by virtue of a warrant for extradition . . . pursuant to a demand . . . by the Governor of the State of Mississippi.'
>
> "In substance it is alleged that the conviction in Mississippi was unlawful and in violation of the Fourteenth Amendment in that 'petitioner was sentenced by said court by use of a forced confession'; that petitioner was denied counsel; that the judgment, 'imposed upon the petitioner cruel and inhuman punishment' in connection with which many details were alleged; that 'for this court to render a judgment that will allow the agents of the State of Mississippi to take the petitioner into custody would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the United Nations Charter, in that this would constitute state action of the State of California and would directly cause his return to the State of Mississippi to effectuate a sentence of cruel and inhuman punishments . . . for he, a Negro, has challenged the State of Mississippi, its brutality which is permeated by hatred of the Negro, and its open vicious and deadly programs of terrorism against the Negro citizen' and that 'The action of the Governor of the State of California in issuing the warrant of extradition, and officers of the Sheriff's Department of Los Angeles, under said warrant, are contrary to the prohibitions of the Fourteenth Amendment to the Constitution of the United States, in that they are actions of the State in aid of

a violation of constitutional rights guaranteed to him, the petitioner, by the due process clause of the federal constitution.' "

The Court said with regard to the issues presented by the petition:

> "It is well settled that the scope of inquiry in such a proceeding is limited to a determination of the sufficiency of the papers and the identity of the prisoner."

The Court cited the recent case of *Johnson v. Matthews, supra,* in denying the petition for a writ.

2.

The demand of the Governor of Georgia, accompanied by all requisite authenticated documents for the extradition of appellee as a fugitive from justice from the State of Georgia, invoked into operation the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of California.

The congressional act regulating interstate extraditions has been supplemented by state legislation in aid of the Act of Congress. Fricke in "California Criminal Procedure" at page 33 states:

> "More than one-half of the United States have already adopted a uniform act to govern extradition proceedings and in those states, which include California, the statute law is now the same though the section numbers of the statutes may be different."

Fricke, *supra,* at page 32 lists the following states as having adopted the Uniform Extradition Act: Alabama, Arizona, Arkansas, California, Delaware, Idaho, Indiana,

Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

The validity of state legislation ancillary to and in aid of the Act of Congress regulating interstate extraditions is now well established.

In re Tenner (1942), 20 Cal. 2d 670;

In re Harris (1941), 309 Mass. 180, 34 N. E. 2d 504.

On the other hand, the enactment of legislation by a state which would impair the operation of Article IV, Section 2, Clause 2, of the Constitution of the United States and of the Act of Congress regulating interstate extraditions by requiring more evidence of guilt than required by the Act of Congress is unconstitutional.

In re Tenner (1942), 20 Cal. 2d 670, 677;

Kurtz v. State (1886), 22 Fla. 36;

1 *Am. State Reports* 173.

It has likewise been held that a state has no power to limit the right of a chief executive to grant warrants of extradition.

State ex rel. Brown v. Grosh (1941), 152 S. W. 2d 239, 245, 177 Tenn. 619.

It is clearly established that state laws cannot make any requirements further than those made by the Act of Congress although it has been well established also that the laws of the state on the subject of extradition may require the governor to surrender a fugitive on terms less

exacting than those imposed by the Act of Congress and also that the state may provide for cases not provided for by the United States. Supporting cases are:

State ex rel. Lea v. Brown (1933), 166 Tenn. 669, 64 S. W. 2d 841, 91 A. L. R. 1246 (writ of certiorari denied in 292 U. S. 638 (1934), 78 L. Ed. 1491);

In re Tenner, supra.

The Uniform Extradition Act in aid of the Act of Congress regulating interstate extraditions has been enacted by the State of California and has been in force and effect in the State of California since 1937, and some provisions thereof have been upheld as constitutional.

In re Morgan (1948), 86 Cal. App. 2d 217;

In re Davis (1945), 68 Cal. App. 2d 798;

Ex parte Morgan (1948), Dist. Ct. S. D., Cal. Central Div., 78 Fed. Supp. 756. Affirmed 1949 by the U. S. Court of Appeals of the Ninth Circuit Court, 175 F. 2d 404.

Section 1548.2 of the Penal Code of California, one of the provisions of the Uniform Extradition Act, provides for the form and prerequisite allegations of demand for the extradition of a fugitive from justice as follows:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding

State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

Section 1549.2 of the Penal Code of California, another provision of the Uniform Extradition Act in force and effect in California, provides:

"If a demand conforms to the provisions of this chapter, the Governor shall sign a warrant of arrest, which shall be sealed with the State seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

Section 1549.3 of the Penal Code of California relates to the authority conferred by the Governor's warrant to arrest an accused, and reads as follows:

"Such warrant shall authorize the peace officer or other person to whom it is directed:

(a) To arrest the accused at any time and any place where he may be found within the State;

(b) To command the aid of all peace officers or other persons in the execution of the warrant; and

(c) To deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding State."

Section 1553.2 of the Penal Code of California restricts the scope of inquiry by the Governor or California courts in extradition cases. The section reads:

"The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

Under authority of the statutes above quoted, the form and allegations of the demand of the Governor of Georgia accompanied by all requisite documents invoked into operation the above designated provisions and appellee was held in custody in conformity therewith.

3.

The scope of the inquiry in an application for habeas corpus in cases having an extradition base is limited to the following questions: (1) whether the person demanded has been subsantially charged with crime, and (2) whether he is fugitive from justice of the demanding state.

The petition for a writ filed by appellee raised no issue within the scope of inquiry applicable to rendition proceedings. Appellee's petition raises no issue of mistaken identity, that appellee is not charged with any crime in the demanding state; that he was not in the demanding

state at the time of the commission of the alleged crimes, nor that appellee was not a fugitive from the demanding state. The District Court in Finding of Fact No. 2 [R. pp. 82, 83] found that the appellee had been arrested and was being held in custody by the appellant Sheriff of Santa Barbara County, California, under and pursuant to a warrant of arrest issued by the Governor of Georgia, upon written requisition of the Governor of the State of Georgia, certified as authentic; that the requisition was accompanied with a copy of the indictment charging appellee with the commission of five counts of burglary, a copy of the judgments and conviction and sentence of appellee on each of five counts of burglary, each of which accompanying documents was certified as authentic.

The District Court in Finding of Fact No. 7 [R. p. 86] acknowledges that the appellee escaped from the Walton County Public Works Camp on or about July 19, 1939, and fled the State of Georgia.

The District Court, notwithstanding the above referred to findings, refused to accept or apply in this extradition proceeding the well established scope of inquiry applicable to extradition proceedings.

A leading case limiting the scope of inquiry is the case of *Biddinger v. Commissioner of the City of New York* (1917), 245 U. S. 128, 135. Justice Clark at page 135 said:

> "This much, however, the decisions of this court make clear: that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in proper form the only evidence sanctioned by the court as admissible on such a hear-

ing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state."

In *Drew v. Thaw, supra,* the facts involved were substantially as follows: Thaw was held upon a warrant issued by the Governor of New Hampshire pursuant to an extradition demand from the Governor of New York. The indictment alleged that Thaw had been committed to a state hospital for the insane under an order reciting that he had been acquitted at his trial upon a former conviction on the grounds of insanity and that he had escaped from such state hospital. Justice Holmes at page 439 said:

"The most serious argument on behalf of Thaw is that if he was insane when he contrived his escape he could not be guilty of crime, while if he was not insane he was entitled to be discharged; and that his confinement and other facts scattered through the record require us to assume that he was insane. But this is not Thaw's trial. In extradition proceedings, even when as here a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. Article 4, Sec. 2. Pettibone v. Nichols, 203 U. S. 192, 205. There is no discretion allowed, no inquiry into motives. Kentucky v. Den-

nison, 24 Howe 66; Pettibone v. Nichols, 203 U. S. 192, 203. The technical sufficiency of the indictment is not open. Munsey v. Clough, 196 U. S. 364, 373. And even if it be true that the argument stated offers a nice question, it is a question as to the law of New York which the New York courts must decide."

Other decisions of the Supreme Court of the United States supporting the proposition are:

Whitten v. Tomlinson (1895), 160 U. S. 231, 40 L. Ed. 406;

Hogan v. O'Neill (1921), 255 U. S. 52, 65 L. Ed. 497.

Recent decisions in extradition cases disclose that the focal point of limited inquiry in habeas corpus cases involving an extradition base remains sound law.

Johnson v. Matthews (May 1, 1950), *supra* (Opinion in Appendix);

In re Application of Eugene Backstron, for Writ of Habeas Corpus (July 19, 1950), *supra;*

Huff v. Ayers (Feb. 14, 1950), 6 N. J. Super. 380, 71 A. 2d 392.

In *Brewer v. Goff, Sheriff* (1943), 138 F. 2d 710, at page 712, the Court said:

"The only prerequisites to extradition from one state to another are, that the person sought to be extradited is substantially charged with a crime against the laws of the demanding state, and that he is a fugitive from justice . . . Admittedly, the extradition papers are in proper form, that is, he is substantially charged with having violated his

parole in California, and it is well established that a parole violation is an extraditable offense within the meaning of the statute."

The decision of Judge Yankwich in *Ex parte Morgan,* District Court S. D. California, Central Division (1948), 78 Fed. Supp. 756, at page 761, also confirms the narrow limits of the Federal Rendition Act; affirmed by the United States Court of Appeals for the Ninth Circuit in 175 F. 2d 404.

Decisions of the courts of California involving habeas corpus matters having an extradition base have conformed to the controlling principles as announced by the Supreme Court of the United States. In an early case arising in California, *In re Letcher* (1904), 145 Cal. 563, it was contended in an extradition matter that the indictment by an Ohio grand jury was rendered without any legal evidence having been submitted to the grand jury. The Supreme Court of California at page 564, said:

> "The indictment charges a public offense within the statute of the State of Ohio. The regularity of the proceedings had in that state before extradition is not reviewable by us in this proceeding."

In the case of *In re Murdock* (1936), 5 Cal. 2d 644, 648, the Supreme Court of California said at page 648:

> "Whether the petitioner is guilty of an offense under the laws of Montana or whether he has a good defense to the charge by reason of lapse of time or otherwise are questions for the courts of that state, rather than for the tribunals of this commonwealth. In interstate extradition proceedings it is not the purpose of the writ of habeas corpus to substitute the judgment of a tribunal of the state where the accused is apprehended upon the facts or the law of the mat-

> ters to be tried. (Drew v. Thaw, *supra.*) Nor is it proper to be governed by speculation as to what ought to be the result of the trial in the demanding state."

Other cases supporting the principle of the limited inquiry are:

> *In re Brown* (1929), 102 Cal. App. 97;
>
> *In re Frank F. Harper* (1936), 17 Cal. App. 2d 446.

In the case of *In re Davis* (1945), 68 Cal. App. 2d 798, the Court upheld extradition demands by Iowa, and said at page 810:

> "The statute of limitations as a defense must be asserted in the trial of the offense with which the petitioner is charged."

This basic principle of limited inquiry in habeas corpus cases having an extradition base has been written into the Uniform Extradition Act and is applicable to the Governor and the courts of California.

Section 1553.2 of the Penal Code of the State of California reads:

> "The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

The District Court fails in its opinion to consider or mention any of the landmark decisions of the United

States Supreme Court establishing the scope of extradition inquiry and the issues which are presented by it.

The District Court commits the fallacy of shifting grounds to a question not in issue in the case, that is, with respect to the scope of inquiry applicable to habeas corpus proceedings involving non-rendition cases. The District Court [R. p. 54] in effect projects the sphere of inquiry applicable in non-rendition cases to rendition cases in lieu of the well established and limited scope of inquiry rule. Cases are cited by the Court [R. p. 54] in support of the position taken that the Court was required to inquire into the issues presented by appellee's petition.

Johnson v. Zerbst (1938), 304 U. S. 458, 82 L. Ed. 1461, cited by the Court, is not an extradition case, but involved a federal prisoner who in his trial was denied certain rights under the Sixth Amendment to have assistance of counsel for his defense.

Waley v. Johnston (1942), 316 U. S. 101, 86 L. Ed. 1302, cited by petitioner, does not involve an extradition case, but that of a federal prisoner who was convicted on a plea of guilty coerced by certain federal law enforcement officers. Nothing is said in the case remotely indicating that in rendition cases such inquiry would be warranted.

Mooney v. Holohan (1935), 294 U. S. 103, does not sustain the argument advanced as to the wide scope of habeas corpus in rendition cases.

Neither were the cases of *Moore v. Dempsey* (1923), 261 U. S. 86, 67 L. Ed. 543, and *Frank v. Magnum* (1915), 237 U. S. 309, extradition cases, and no comment is made in those cases that at a rendition stage the scope of inquiry is broad enough to include inquiry such as sought in the instant case.

(1) Applicant Seeking to Defear Extradition Is Not Entitled to Release on Habeas Corpus on Ground That He Has Been Denied Assistance of Counsel in the Demanding State.

In the case of *Ex parte Colier*, decided by the Court of Errors and Appeals of New Jersey (1947), 55 A. 2d 29, the Court considered this same issue. The case involved an extradition proceeding instituted for the return of the petitioner to the State of South Carolina. He had been tried and convicted, and while serving sentence upon several convictions of crime he escaped in 1938. At page 30 the Court said:

> "The petitioner does not deny his identity or the fact that he is a fugitive from justice. He objects to his return to South Carolina upon the ground that he 'was tried on a criminal indictment for larceny and house-breaking without the assistance of counsel, and without intentionally and intelligently waiving his civil and constitutional right to the assistance of counsel.' The petitioner never applied to the South Carolina courts to have his claim now made that he was deprived of his constitutional right to counsel on the trial of the indictments passed upon. The right to do so is still open to him, and in the event such application to the courts of that state if his efforts should prove fruitless, he still has open to him the right to apply to the United States Supreme Court for its protection of his constitutional right."

The Court continues:

> "It is the law that the asylum state of a person fleeing the state of his conviction for crime has no right to consider the merits of his trial, but only the question as to the obligation of the asylum state to surrender the person to the state from which he fled.

> The question of guilt or innocence, or whether there was a violation of petitioner's constitutional right on the trial of the indictments preferred against him in South Carolina, cannot be determined by this Court. They are to be determined by the courts of the state in which he was tried, and, if denied what he conceives to be his constitutional right, he may apply to the United States Supreme Court for the protection of such right. (Citing cases.) The order to show cause is discharged and the application for the writ of habeas corpus denied."

The Supreme Court of the United States on February 2, 1948, denied a petition for a writ of certiorari in this case. (333 U. S. 828, 829.)

Other supporting decisions that such issue is beyond the scope of inquiry at the rendition stage are: *In re Backstron, supra; Johnson v. Matthews, supra.*

The District Court in the instant case, on the other hand, held that the failure to afford counsel for the appellee constituted a denial of due process by the State of Georgia. [See Court's opinion, R. p. 57.]

The case of *Uveges v. Commonwealth of Pennsylvania* (1948), 335 U. S. 437, 93 L. Ed. 152, cited by the District Court in support of its conclusion, is not an extradition case. The decision was rendered on writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania after the exhaustion of remedies in the state courts where the petitioner had been convicted. Similarly, the case of *Wade v. Mayo,* 334 U. S. 672, 92 L. Ed. 1647, cited by the Court, did not involve an extradition case.

The factual situation there involved the refusal of a court in Florida to appoint counsel for him. He exhausted the remedies of the offending state and then resorted to the Federal courts for relief.

The case of *Gibbs v. C. J. Burke* (June 27, 1949), 93 L. Ed. (Advance Opinions) 1343, cited by the Court in support of its conclusion, was not an extradition case, and, among other things, held that the due process clause does not guarantee to every person charged with a serious crime in a state court the right to the assistance of counsel, regardless of circumstances. Exhaustion of remedies was shown in that case in the state courts of the state where the alleged deprivation of counsel occurred.

(2) The Alleged Violation of Constitutional Rights in Connection With Commitment and Conviction of Middlebrooks for the Burglary Offenses Presents No Litigable Issue at the Present Rendition Stage.

State ex rel. Lea et al. v. Brown et al., decided by the Supreme Court of Tennessee (1933), 64 S. W. 2d 841. This case involved an extradition proceeding in Tennessee arising out of a demand by the Governor of North Carolina for the return of petitioners as fugitives from justice from that State. The petitioners contended that they had been denied due process of law by the courts of North Carolina, as a defense to the extradition proceeding. The Court, at page 844, said:

> "In our opinion, the only questions open for consideration in this proceeding are whether the relators are charged with crime in North Carolina and are fugitives from the justice of that state. These were

the only questions proper for the Governor to consider in determining whether he should issue his warrant on the demand of the Governor of North Carolina."

Continuing, the Court said at page 844:

"If the procedure followed by the state of North Carolina in the trial and conviction of the relators violated any of their constitutional rights, and if there has been no conclusive adverse adjudication of those points, it would nevertheless be our duty, under the Constitution of the United States, to presume that such wrongs will be remedied when and if the relators are restored to the jurisdiction of North Carolina and steps are there taken to enforce the judgment of its courts. We repeat, this proceeding in Tennessee is not a proceeding to enforce the judgment of the North Carolina courts, but is purely incidental thereto, and the only inquiry open here is whether the Governor of Tennessee rightfully concluded that relators, being charged with crime in North Carolina, have fled to Tennessee from the justice of that state."

The Court further said at page 845:

"These views follow necessarily from the nature of the proceeding, an application for the writ of habeas corpus to test the validity of the Governor's warrant by the Constitution and statute of the United States, pursuant to which it was issued. Being without jurisdiction to enforce the judgment of North Carolina, the courts of Tennessee are without jurisdiction to inquire into the validity of such judgment as a basis for granting or denying extradition. And, if the relators have been denied due process of law by the courts of North Carolina, with respect to matters not already adjudicated, they should be left free to present such

matters to a state or federal court to which the state of North Carolina is subject, whenever that state, having regained custody of them, endeavors to enforce its judgment. The relators will remain under the protection of the Federal Constitution, if returned to North Carolina, and this proceeding for the writ of habeas corpus is a summary proceeding, 'to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest.' Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 43, 62 L. Ed. 193.

"This limitation of the scope of our jurisdiction in this proceeding is clearly indicated by the rulings of the Supreme Court. Munsey v. Clough, 196 U. S. 364, 25 S. Ct. 282, 284, 49 L. Ed. 515; Drew v. Thaw, 235 U. S. 432, 35 S. Ct. 137, 59 L. Ed. 302; Hogan v. O'Neill, 255 U. S. 52, 41 S. Ct. 222, 65 L. Ed. 497."

The Supreme Court of the United States denied a writ of certiorari in this case (1934), 292 U. S. 638, 639; 78 L. Ed. 1491.

In the case of *Powell v. Meyer* (1945), 43 A. 2d 175, there was involved an extradition demand by the State of Georgia for the return of petitioner from the State of New Jersey. The petitioner contended on habeas corpus proceeding to defeat the extradition that he had been denied equal protection of the law and due process of law, in the Negro citizens were systematically excluded from the grand and petit juries by which he, a Negro, was indicted, tried and convicted of the offense of murder. He contended that because of popular feeling against him he did not have a fair trial and that he feared mob violence if re-

turned. Petitioner had escaped from confinement and went to New Jersey, where he lived until his arrest on an extradition warrant. The Court at page 177 said:

> ". . . It has long been settled that, on extradition the asylum state has no right to consider the merits—the prisoner's guilt or innocence—but only the question of whether the prisoner is within the extradition clause itself, *i.e.*, his identity with the fugitive charged, and the fact that the charge is one of actual crime. . . .
>
> "Often the courts, out of sympathy for the prisoner, are wont to scrutinize extradition proceedings rather closely. But in these cases it seems to be overlooked that the prisoner's rights and persons can be fully protected, while at the same time the state's constitutional obligations, as above, can be fully performed. Here, specifically, Powell's rights can be fully protected, even on his return to Georgia, by application there to either or both the state and, if necessary, the Federal, courts in Georgia.
>
> "On the other hand, Powell has never yet presented to the Georgia courts the grounds of objection he now urges. How can he, in justice, charge Georgia with injustice, unheard? And even should his application to the state courts of Georgia prove fruitless, he is amply protected by his then clear right to apply to the United States Supreme Court for its protection of his constitutional rights."

The Supreme Court of New Jersey on April 22, 1946, affirmed the decision of the lower court at 46 Atlantic Reporter 2d 671. The Supreme Court of New Jersey at pages 671-672 said:

> "The question of guilt or innocence, or whether there was a violation of prosecutor's constitutional

rights in the proceedings in the courts of Georgia, cannot be determined by the courts of this state. They are to be determined by the courts of the state in which he was tried, and, if denied what he conceives to be his constitutional rights, he may apply to the United States Supreme Court for the protection of such rights.

"We conclude that this court is without jurisdiction to deal with the alleged denial of prosecutor's constitutional rights by the courts of Georgia, on return of a writ of habeas corpus, and that the rule to show cause must be discharged and a writ of certiorari to review the action of the Essex County Court of Common Pleas denied."

The following cases and authorities support the proposition of limited inquiry in extradition cases:

In *Ex parte Quilliam, Ex parte Woodall* (June 13, 1949), decided by a Court of Appeals of Ohio, 89 N. E. 2d 493, the Court said:

"It is the view of this Court that the question here presented is one which seeks to invoke the jurisdiction of this Court to pass upon a question which it is beyond the power of this Court to consider, that is, whether or not a sister State is violating the Constitutional rights of one charged and convicted of crime by its courts.

"If the constitutional rights of a prisoner are being violated in the sister State, such question should be presented by proper proceedings to the courts of that State for remedy. The only remedy that would be available by granting the writs here requested would be to release the prisoners in the State of Ohio, thus in effect commuting their sentences for serious crimes of which they have been found guilty."

The Supreme Court of Ohio dismissed appeal (1949), 152 Ohio St. 368, 89 N. E. 2d 494.

In *Ex parte Paramore* (1924), 123 Atl. 246, affirmed in 125 Atl. 926, the petitioner raised the issue in an extradition case that he feared mistreatment or lynching if returned to the demanding state. Petition denied.

In *Blevins v. Snyder,* U. S. Marshal (1927), decided by Circuit Court of Appeals of the District of Columbia, 22 F. 2d 876, the issue was raised that the petitioner could not get a fair trial if returned to the demanding state. Writ denied.

In *Pelley v. Colpoys,* U. S. Marshal (1941), 122 F. 2d 12, the petitioner raised the issue that the proceedings for his extradition originated out of a judge's personal animosity. Petition for a writ denied. Certiorari denied (1941) 86 L. Ed. 499.

In *Ex parte Ray* (1921), decided by Supreme Court of Michigan, 183 N. W. 774, 776. The petitioner in an extradition matter raised the issue that he would not have a fair trial in the demanding state if returned. Held not in issue in an extradition proceeding.

In *U. S. ex rel. Faris v. McClain,* Warden (1942), 42 Fed. Supp. 429, the petitioner alleged that he was not a fugitive from justice, but from injustice; that the injustice consisted of certain prison conditions, chaining at night, unsuitable food and methods of punishment. Petition denied.

In *Hale v. Crawford* (1933), the Circuit Court of Appeals, First Circuit, 65 F. 2d 739, held that alleged exclusion of Negroes from grand jury was not an issue in interstate extradition proceedings. Petition for certiorari refused. 78 L. Ed. 581 (1933).

(3) Alleged Cruel Treatment Is Beyond the Scope of Inquiry in an Extradition Case.

The Court in its opinion [R. pp. 62 to 66, incl.] held that the punishment inflicted on petitioner by the State of Georgia, through its chain gang, constituted cruel and unusual punishment and was a violation of the due process clause of the Fourteenth Amendment. The Court cited the decision of the U. S. Court of Appeals for the Third Circuit in *Johnson v. Dye* (1949), 175 F. 2d 250, 255, in support of its conclusion.

The decision of Judge Biggs in *Johnson v. Dye, supra,* was based upon the following premise: The Court said at page 256:

> "The doctrine of exhaustion of state remedies in habeas corpus cases does not apply to extradition."

This case was, however, reversed by the Supreme Court of the United States on November 7, 1949, 70 S. Ct. 146, 94 L. Ed. (Adv. Ops.) 67. The Court said in reversing the case:

> "The petition for writ of certiorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 88 Law Ed. 572."

A rehearing by the United States Supreme Court was refused. (December 5, 1949, 94 L. Ed. 149, 70 S. Ct. 238, 338 U. S. 896.)

The District Court in its opinion [R. p. 65] took the position that *Johnson v. Dye, supra,* having been reversed on procedural grounds, there is an inference that the Supreme Court was not disturbing those portions of the opinion dealing with cruel and unusual punishment and the scope of the constitutional protection under the Fourteenth

Amendment. We see no merit to this contention. To project such an inference into a conclusion that the numerous decisions of the Supreme Court limiting the scope of inquiry in rendition cases are no longer sound law is a *non sequitur* fallacy. The Supreme Court passed on the issue before it and the Court would have been prejudging the issue of cruel and unusual punishment by commenting on a phase of the case which was not properly before it, in view of the non-exhaustion of remedies. *Johnson v. Dye* has been reversed and cannot, in view of its reversal, constitute authority as against the avalanche of decisions for generations upholding the limited scope of inquiry on the basis of the Federal Rendition Act.

The United States Court of Appeals for the District of Columbia in footnote No. 22 to its decision in *Johnson v. Matthews* (182 F. 2d 677, 682, 683) interprets the reversal of *Johnson v. Dye, supra,* by the Supreme Court as follows:

> "175 F. 2d 250 (1949). That case was reversed by the Supreme Court (338 U. S. 864 (1949)) without opinion and without dissent, upon a single reference, 'Ex parte Hawk, 321 U. S. 114.' Ex parte Hawk contained no reference to extradition. It concerned procedure in habeas corpus in the federal court having jurisdiction in the state where the petitioner was indicted, convicted, sentenced and incarcerated. The petitioner there was thus confined in the Nebraska State Penitentiary under sentence for murder imposed by a Nebraska District Court. The habeas corpus was sought in the United States District Court for Nebraska. The Supreme Court held that he must exhaust his remedies in the courts of

Nebraska. Applying the doctrine of that case to Johnson v. Dye—and to the case at bar—the petitioner would be required to exhaust his remedies in the courts of Georgia before resorting to the federal courts. If the Supreme Court, in Johnson v. Dye, meant that the petitioner must exhaust his remedies in the Pennsylvania courts (where he was being held for extradition only), it meant that those courts had jurisdiction to entertain, and so to grant, his petition upon the grounds he alleged. That would have been a revolutionary reversal of all the cases ever written upon the subject, and we have serious doubt that the Court intended to accomplish that result without argument and without opinion. Rather it seems more reasonable that the Court meant, by citing Ex parte Hawk, to tell the petitioner to apply first to the state courts of Georgia which had jurisdiction over the executive officials against whom he was complaining."

The decision of the United States Supreme Court in *Louisiana ex rel. Francis v. Resweber* (1947), 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422, is not authority for the District Court's position that cruel and unusual punishment is a litigable issue in a rendition case. On the other hand, the case contains authority for the proposition that a prisoner need not be released although his punishment is cruel and unusual. In this case the petitioner contended that he was to be punished in a cruel and unusual manner by being placed in the electric chair for the second time, after an electrical failure at the time set for the initial electrocution. The majority of the

Court came to the conclusion that the punishment was not cruel or unusual. Justice Burton, speaking for the minority group of judges, said at page 480:

> "The remand of this case to the Supreme Court of Louisiana in the manner indicated would not mean that the relator necessarily is entitled to a complete release. It would mean merely that the courts of Louisiana must examine the facts both as to the actual nature of the punishment already inflicted and that proposed to be inflicted and, if the proposed punishment amounts to a violation of due process of law under the Constitution of the United States, then the State must find some means of disposing of this case that will not violate that Constitution."

Stanford Law Review (December, 1949), Volume 2, Number 1, pages 174, 178, states, in commenting on this decision:

> "Here then were four justices of the Supreme Court who would hold that a prisoner need not be released although his punishment is cruel and unusual. The other five justices voiced no opinion on this question.
>
> "The proper remedy, therefore, for cruel and unusual punishment is to remand the prisoner to the prison officials to be dealt with in a manner authorized by the Constitution. A convict validly held for a crime against the state would not be thrust upon society; and yet the court could give him some assurance that he would not be mistreated in the future."

The same Law Review article, in commenting upon the decision of *Johnson v. Dye, supra,* said at page 183:

> "The court went beyond its jurisdiction in considering the treatment accorded Johnson on the chain gang. At most it should have asked three questions: was Johnson validly charged with a crime in Georgia; was he a fugitive from its justice; and was there danger of mob violence in case he was returned? Had the Court stopped there, Johnson would have been returned to Georgia where he could avail himself of any of the possible remedies we have discussed."

Harper v. Wall, 85 Fed. Supp. 783 (D. N. J. 1949), and *Ex parte Marshall,* 85 Fed. Supp. 771 (D. N. J. 1949) should not be regarded as authoritative cases on the admissibility of evidence involving alleged cruel and unusual treatment for the reason that such cases were based upon the decision of the United States Court of Appeals, Third Circuit, in *Johnson v. Dye, supra,* which, as we have pointed out, was reversed by the Supreme Court of the United States.

Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544 (1910), involved a factual situation wherein there was exhaustion of the remedies of the Philippine territorial courts before the Supreme Court on appeal passed upon issues with regard to alleged cruel and unusual punishment.

Justice O'Connell in a dissenting opinion in *Johnson v. Dye, supra,* made a distinction between past punishment

involving cruel and unusual punishment and a prospective violation involving such punishment. He expressed great doubt whether past infringements of punishment involving constitutional rights would of itself entitle Johnson to release and favored remanding of the case to determine whether Johnson would reasonably likely be required to undergo similar abuse if he were returned to the demanding state.

Circuit Judge Bazelon in a dissenting opinion in *Johnson v. Matthews, supra* (Opinion in the Appendix), also was in agreement with the views of Justice O'Connell and favored a remanding of the case for a determination whether it was reasonably likely he would undergo similar abuse if returned to the demanding state.

The record in the instant case is barren of any evidence of penal practices or conditions in Georgia prisons as of the date of the trial on December 20, 1949.

Sylvester Middlebrooks' testimony regarding alleged mistreatment and conditions in Georgia prisons covers a period prior to July 13, 1939, when he escaped and fled the State of Georgia.

Similarly, the testimony of Horace B. Conkle regarding conditions in a Georgia prison concerned conditions prior to July of 1939 [R. p. 190]. The above named witness did testify [R. p. 191] that he made a visit to Georgia in the year 1945 or 1946 and observed chain gangs at work, but that he did not observe any brutality on that trip [R. p. 192]. We do not regard as competent evidence

the excerpt of a reprint of the President's Committee on Civil Rights as it appeared in the San Francisco News and which refers to the alleged killing of eight Negro prisoners on July 11, 1947 as they allegedly attempted to escape [R. pp. 201, 203].

Notwithstanding the absence of evidence in respect to present conditions of Georgia prisons, the District Court makes a finding of fact, identified as No. 8 [R. p. 86], that appellee would be subjected to the penal methods and practices set forth in finding of fact No. 5 [R. pp. 84, 85], which refers to conditions and penal practices as of the time of the appellee's original commitment.

Also in conclusion of law No. 11 [R. p. 91] the District Court made a determination that the appellee would again be subjected to cruel and unusual punishment if he were returned to the State of Georgia. Such conclusion of law is not supported by any evidence.

Other cases in opposition to the conclusion of the Court that alleged cruel treatment is within the scope of inquiry in extradition cases are:

Johnson v. Matthews, supra;

In re Backstron, supra;

People ex rel. Jackson v. Ruthazer, 196 Misc. 34, 90 N. Y. S. 2d 205 (1949).

Volume 23, Southern California Law Review, July, 1950, No. 4, page 441, expresses views in opposition to those expressed herein.

4.

The failure of the Court to test the asylum state's arrest and detention for extradition purposes within the established rule of extradition inquiry nullified the provisions of Article IV, Section 2, Clause 2, of the Constitution of the United States, and the Act of Congress regulating interstate extraditions. (18 U. S. C. 3182.)

Conclusion of Law No. 14 [R. p. 92] states:

> "The conclusions of law contained in the opinion of the court filed February 3, 1950, are by this reference incorporated in these Findings of Fact as fully as if set forth in *haec verba*."

The District Court in Part V of its opinion [R. pp. 69, 70) presents the following conclusions of law. The District Court states:

> "Neither the Uniform Extradition Act of the State of California, Nor Article IV, Section 2, Clause 2 of the Constitution of the United States Nor the Act of Congress, Regulating Interstate Extraditions, Prevail Over the Fourteenth Amendment.
>
> "The proposed rendition of the prisoner by California is pursuant to the compact to effect rendition of persons 'charged in any State with Treason, Felony or other crime,' contained in Art IV, Section 2, Clause 2 of the U. S. Constitution. But Art. IV does not require rendition which violates the Fourteenth Amendment of the same Constitution. This disposes of the respondent's contention that to grant the release of petitioner under this writ, the court must hold unconstitutional the Uniform Extradition Act of the State of California.

"Statutes constitutional on their face may not be used for unconstitutional purposes or with unconstitutional results.

"See Yick Wo v. Hopkins, 118 U. S. 356; 373-374, 30 L. Ed. 220 (1886).

"As we have stated herein action by a State in arresting and holding a prisoner for extradition, may be ostensibly lawful and then by the revelation and judicial finding of certain facts thereafter, may be determined to be unlawful custody, violative of the due process clause of the Fourteenth Amendment."

The *Yick Wo v. Hopkins* case, *supra,* cited by the District Court in support of its conclusion involved the following factual situation: A county ordinance was enacted to regulate public laundries in the City and County of San Francisco. The ordinance prohibited the engaging in the laundry business without first having obtained the consent of the Board of Supervisors. The evidence introduced in the case showed that the Board of Supervisors withheld their consent to establish laundries to subjects of China who were residing in the United States, but who were not citizens of the United States. On the other hand, Chinese people who were citizens of the United States were readily granted licenses. The unequal and unjust discrimination in the administration of the ordinance was, therefore, an issue in the case. The Court said at page 373:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and

> illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The issue in the *Wo* case, therefore, involved a regulatory ordinance which was administered discriminatorily in favor of citizens and against aliens.

It is clear that the case presents no practical analogy with the issues involved in the instant case. There assuredly is no issue of discrimination in the administering of Article IV, Section 2, Clause 2, of the Constitution of the United States, or the Act of Congress regulating interstate extraditions.

In the case of *Bird v. U. S.,* 187 U. S. 118, 124, 47 L. Ed. 100, 103 (1902), the Supreme Court said:

> "There is a presumption against the construction which would render a statute ineffective or inefficient or which would cause great public injury or even inconvenience."

In *U. S. v. Neal Powers et al.,* 307 U. S. 214, 83 L. Ed. 1245 (1939), the Supreme Court approved the above quoted language of the *Bird* case, *supra,* and applied the doctrine.

In *Yankee Net Work v. Federal Communications Commission,* 107 Fed. Rep. 2d 212, 219 (1939), and in the case of *Buxbom v. City of Riverside,* 29 Fed. Supp. 3 (1939), the courts rejected analogies based on *Yick Wo v. Hopkins, supra,* case and applied the presumption referred to in the *Bird* case, *supra.*

The nullification of the constitutional provision and congressional enactment pertaining to interstate extraditions on the basis of the District Court's analogy from the *Yick Wo v. Hopkins, supra,* case is unwarranted.

Circuit Judge Prettyman in *Johnson v. Matthews*, 182 F. 2d 677, 682, rejected any inference of conflict between the extradition clause and the due process clause in the following language:

> "It is said that this case presents a conflict between provisions of the Constitution. It presents no such conflict. The extradition clause is a procedural provision. It does not impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights. The provision of the Constitution which provides that trial for a crime committed in Georgia shall be in Georgia does not impinge upon any constitutional right of criminal defendants in Georgia. . . ."

Another compelling reason for rejection of an inference of conflict is well expressed by the Court at page 684, as follows:

> "The chaos into which the enforcement of criminal law would be plunged by the doctrine urged upon us by appellant is as readily discernible now as it was when the Colonies first made what is now the existing agreement. The case before us concerns Georgia. The next might concern Alabama. The question there might be whether casually attended, ununiformed laborers with chains attached to their legs, at work in the open air on country roads, are undergoing cruel and unusual punishment. The next case might concern New York or Illinois, and the question might be whether serried, shaved and numbered robots in the monotony of gray walls, or in occasional solitary confinement in darkened cells on bread and water, are suffering cruel and unusual punishment. And so a pattern of opinion in this jurisdiction concerning the penal practices of all the forty-eight states would in time necessarily develop."

5.

The failure of the Court to test the asylum state's arrest and detention for extradition purposes within the established rule of extradition inquiry nullified the provisions of Sections 1548.2, 1549.2, 1549.3 and 1553.2 of the Penal Code of the State of California.

We have heretofore pointed out that these sections of the Penal Code of California are provisions of a Uniform Extradition Act which are in force and effect in 31 states of the Union.

The Court in his Conclusions of Law [see Part V of the Court's opinion R. pp. 69, 70, heretofore quoted in the preceding section of this brief] determined that the Uniform Extradition Act was operative against appellee for unconstitutional purposes and with unconstitutional results and in violation of the due process clause of the Constitution of the United States.

We adopt the argument advanced in the preceding section of this brief with regard to this issue and urge that such procedural provisions of the Penal Code of California do not impinge upon any substantive rights of the appellee.

The form and requisite allegations of demand accompanied by all necessary authenticated documents invoked into operation the provisions of Section 1548.2 of the Penal Code of California and the Governor of California was required to honor the requisition demand of the Governor of Georgia for the arrest of appellee as a fugitive. Neither the Governor of California nor the courts of California under the provisions of Section 1553.2 could make inquiry of such matters as requested in the petition filed by appellee. All of the above referred to sections of the Penal Code are quoted in full in the Appendix to this brief at pages 2 and 3.

SECOND SPECIFICATION OF ERROR RELIED ON.

II.

The District Court Erred in Its Findings of Fact and Conclusions of Law in Determining That Appellee-Petitioner for a Writ of Habeas Corpus Based Upon Alleged Deprivations of Constitutional Rights in the Demanding State Need Not Have Exhausted the Remedies of the Demanding State.

The appellee's petition for a writ of habeas corpus fails to allege the exhaustion of any remedies of the State of Georgia, the demanding state, nor was there attempted to be shown during the trial the exhaustion of such remedies or that there was an absence of corrective process in that state. The trial court, on the other hand, made a determination that the appellee need not have exhausted his remedies in the State of Georgia. (See Part VII of the opinion of the Court filed February 3, 1950 [R. pp. 71-77] and incorporated as a conclusion of law of the Court by Section 14 [R. p. 92] of the Court's conclusions of law as if set forth *haec verba.*)

The District Court erred in holding that the appellee need not have exhausted the remedies of the State of Georgia.

The District Court further erred in this connection in finding that there were extraordinary circumstances existing sufficient to justify federal inquiry into the merits without the exhaustion of remedies of the State of Georgia. Hence, also on this specific ground the Court erred in overruling appellant's motion to dismiss the writ on the

ground that the petition for a writ did not state facts sufficient to constitute a cause of action, overruling appellant's objections to the introduction of testimony and evidence on behalf of appellee, and overruling appellant's motion to strike such testimony and evidence.

Argument to Second Specification of Error.

The petition for a writ in this case neither alleged the exhaustion of remedies of the Georgia courts nor alleged an absence of corrective process; nor at the trial of the proceedings was there any attempt to show either exhaustion of remedies of the Georgia courts or that corrective process in those courts was unavailable.

Neither the Court's findings nor conclusions of law make reference to this vital issue. However, the District Court by conclusions of law No. 14 [R. p. 92] incorporates conclusions of law contained in the opinion of the Court filed February 3, 1950, as if set forth *haec verba.*

Part VII of the Court's opinion [R. pp. 71-77, incl.] presents the District Court's conclusions on this subject.

The District Court held at R. p. 72 that "As a practical matter, it is extremely remote that any of the relief would be granted him by the Georgia courts," referring to the relief granted by the District Court on the three principal grounds relied on by the appellee in his petition.

Again, at R. p. 74, the District Court said:

> "A requirement that the petitioner exhaust in Georgia his remedy (referring to the issue of cruel

and unusual punishment), this particular point would be obviously an idle act, since the court can assume that Georgia chain gangs are operated under and pursuant to Georgia law."

The answer to this conclusion is that it is not to be presumed that

> "the decision of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court."
>
> *Ex parte Royall* (1886), 117 U. S. 241, 29 L. Ed. 868, 6 S. Ct. 734;
>
> *Darr v. Burford* (April 3, 1950), 94 L. Ed. Advance Opinions 511, 516.

The record is barren of any showing or evidence in the instant case whatsoever, remotely indicating that the remedies of the Georgia courts or federal courts having territorial jurisdiction over the State of Georgia are seriously inadequate or that corrective process would be unavailable to appellee on the grounds set forth in appellee's petition for a writ. The District Court's comments, above quoted, impugning the integrity of the Georgia courts is wholly unwarranted, and does not create "extraordinary circumstances" or circumstances of a peculiar urgency justifying any departure from the comity principle requiring exhaustion of remedies of the Georgia courts.

The District Court's granting of relief to appellee at the extradition stage, notwithstanding the requirements of the comity rule, is best explained by the Court's conclusions and, in fact, criticism of the rule. The Court at R. p. 75 expresses his conclusions on the subject as follows:

> "A further result has grown up in the cases which is apparent to anyone making a study thereof; the rule of the exhaustion of remedies in the State has been supplemented by the further rule that once the remedies have been exhausted and the highest court of the State has passed upon the problem, then Federal courts are reluctant to intervene because of comity and out of respect for State courts. Thus, there has been created an endless circle, which if followed to its logical conclusion would deny to a Federal District court the right to give relief for violations of basic constitutional rights."

We respectfully request the Court to consider the District Court's criticism of the comity rule in the light of the most recent statements of the Supreme Court of the United States on the origin of the comity doctrine, its purposes and historical development, as set forth in the case of *Pete Darr v. C. P. Burford, supra,* and the opinion of Justice Reed in *Wade v. Mayo,* 334 U. S. 672, 691.

Another answer to the Court's conclusions of law that there was no requirement for exhaustion of remedies of the Georgia courts in the *per curiam* reversal of the case of *Johnson v. Dye* by the Supreme Court of the United

States on November 7, 1949, 70 Supreme Court 146, 94 L. Ed. 67, 338 U. S. 864, in the following language:

> "The petition for writ of certiorari is granted and the judgment is reversed. Ex parte Hawk, 321 U. S. 114, 64 Supreme Court 448, 88 Law Ed. 572."

A rehearing was denied on December 5, 1949, 338 U. S. 896; 94 L. Ed. 149, 70 Supreme Court 238.

Section 2254 of 28 U. S. C., as recodified, now reads:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The Supreme Court of the United States in *Darr v. Burford, supra,* interprets the enactment as being declaratory of existing law as stated by the Court in *Ex parte Hawk, supra.*

The reversal of *Johnson v. Dye, supra,* by the Supreme Court on authority of *Ex parte Hawk* is authority for the proposition that appellee should have exhausted the rem-

edies of the Georgia courts before relief can be granted on habeas corpus at the extradition stage.

At R. p. 76 the Court concludes that violations of constitutional rights such as raised by appellee in his petition constituted exceptional circumstances coming within an exception to the comity doctrine.

The Court said at R. p. 76:

> "The general rule rests upon the balance between the State and Federal powers and jurisdictions, and the niceties of the comities existing between these several sovereignties. The observance of these niceties and the concern concerning comity must give way on the assertion and the finding of the violation of basic constitutional rights."

Again, the answer to the District Court's conclusion is the *per curiam* reversal of *Johnson v. Dye* (which involved the identical issue of alleged deprivations of constitutional rights). The Supreme Court did not construe alleged deprivations of constitutional rights, involving cruel and unusual punishment, as constituting exceptional circumstances or circumstances of a peculiar urgency which would render the rule inapplicable.

We respectfully contend that the Court erred in this conclusion of law, that the appellee need not have exhausted the remedies of the demanding state, and also erred in finding that there were extraordinary circumstances, either pleaded or shown, which have justified inquiry into the merits at the rendition stage without first requiring the exhaustion of remedies of the Georgia courts.

THIRD SPECIFICATION OF ERROR RELIED ON.

III.

The District Court Erred in Its Conclusions of Law That It Was Not Necessary for Appellee-Petitioner to Apply for a Writ of Certiorari to the Supreme Court of the United States After Denial of a Writ of Habeas Corpus by the Supreme Court of California.

The District Court in the instant case in finding of fact No. 9 [R. pp. 86, 87] and conclusion of law No. 1 [R. pp. 88, 89] concluded that appellee had exhausted all remedies available to him in the courts of the State of California, notwithstanding the failure to file a petition for a writ of certiorari to the United States Supreme Court.

The District Court likewise erred in said designated finding of fact and conclusion of law in finding the existence of any exceptional circumstances in the case which would have rendered it unnecessary for the appellee to file a petition for certiorari to the United States Supreme Court from the denial of relief on habeas corpus by the Supreme Court of the State of California.

Argument to Third Specification of Error.

The Supreme Court in the late case of *Darr v. Burford, supra,* overruled, so far as inconsistent, *Wade v. Mayo,* 334 U. S. 672, 92 L. Ed. 1647, and held that, in the absence of special circumstances as to which the petitioner has the burden of proof, certiorari to the United States Supreme Court from a State judgment denying collateral relief is a prerequisite to resort to a federal district court,

irrespective of whether or not denial of certiorari imports an opinion on the merits. At page 522 the Court said:

> "The sole issue is whether comity calls for review here before a lower federal court may be asked to intervene in state matters. We answer in the affirmative. Such a rule accords with our form of government. Since the states have the major responsibility for the maintenance of law and order within their borders, the dignity and importance of their role as guardians of the administration of criminal justice merits review of their acts by this Court before a prisoner, as a matter of routine, may seek release from state process in the district courts of the United States. It is this Court's conviction that orderly federal procedure under our dual system of government demands that the state's highest courts should ordinarily be subject to reversal only by this Court and that a state's system for the administration of justice should be condemned as constitutionally inadequate only by this Court. From this conviction springs the requirement of prior application to this Court to avoid unseemly interference by federal district courts with state criminal administration."

The appellee not having sought certiorari from the denial of his petition for a writ by the Supreme Court of California failed to exhaust the remedies of the asylum State, and the case presents no special circumstances which would render the comity rule inapplicable.

Conclusion.

In conclusion, it is respectfully submitted that the appellee, Sylvester Middlebrooks, Jr., was held in valid custody by the appellant Sheriff of Santa Barbara County in conformity with the requirements of Article IV, Section 2, Clause 2, of the Constitution of the United States and the congressional enactment regulating interstate extraditions, and also in conformity with the requirements of the Uniform Extradition Act in force and effect in the State of California.

It is further respectfully submitted that the judgment discharging and releasing the appellee from custody was erroneous and should be reversed.

Respectfully submitted,

David S. Licker,
District Attorney of the County of Santa Barbara,

Vern B. Thomas,
Assistant District Attorney of the County of Santa Barbara.

Attorneys for Appellant.

APPENDIX A.

Section 1 of Amendment XIV to the Constitution of the United States reads:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Section 2, Clause 2, of the Constitution of the United States provides:

"The person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled be delivered up, to be removed to the State having jurisdiction of the crime."

Section 3182, 18 U. S. C. (1948), formerly 1 Stat. 312-1793, Revised Stat., Sec. 5278, 18 U. S. C., Sec. 662, reads as follows:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so

charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority make such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

Section 1553.2 of the Penal Code of the State of California provides:

"The guilt or innocence of the accused as to the crime with which he is charged may not be inquired into by the Governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided has been presented to the Governor, except as such inquiry may be involved in identifying the person held as the person charged with the crime."

Section 1549.3 of the Penal Code of the State of California provides:

"Such warrant shall authorize the peace officer or other person to whom it is directed:

"(a) To arrest the accused at any time and any place where he may be found within the State;

"(b) To command the aid of all peace officers or other persons in the execution of the warrant; and

"(c) To deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding State."

Section 1549.2 of the Penal Code of the State of California provides:

"If a demand conforms to the provisions of this chapter, the Governor shall sign a warrant of arrest, which shall be sealed with the State seal, and shall be directed to any peace officer or other person whom he may entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance."

Section 1548.2 of the Penal Code of the State of California provides:

"No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State. Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, information, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand."

APPENDIX B.

UNITED STATES COURT OF APPEALS.

For the District of Columbia Circuit.

No. 10425

Lewis A. Johnson, alias Lewis O. Kalap, appellant, v. W. Bruce Matthews, United States Marshal, appellee.

Appeal from the United States District Court for the District of Columbia.

Submitted January 16, 1950—Decided May 1, 1950.

Mr. Philip E. Shapiro for appellant.

Mr. Richard M. Roberts, Assistant United States Attorney, with whom Mr. George Morris Fay, United States Attorney, and Mr. Joseph M. Howard, Assistant United States Attorney, were on the brief, for appellee.

Before CLARK, PRETTYMAN and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant is a fugitive from justice in the State of Georgia. He was found in the District of Columbia. The executive authority of Georgia, producing a copy of an indictment charging him with a crime there, and identifying him as the person indicted, demanded his return. He was arrested and, after a hearing, his delivery to an agent of the State of Georgia was ordered. Thereupon he presented to the United States District Court for the District of Columbia a petition for a writ of *habeas corpus*. In the petition he alleged that he had been arrested and jailed in Georgia for robbery;

that for ten months he was given no preliminary hearing, indictment[1] or trial; and that he thereupon escaped. He alleged that during his incarceration elected local officials "expended every effort" to obtain a sum of money from his wife; that during those months he was moved to three jails, where he was the victim of cruel, barbaric and inhuman treatment, in that he was most severly beaten, starved, and denied clothing or bedding by his jailers, placing his life and health in grave jeopardy. He alleged violations of the Fourteenth Amendment to the Constitution of the United States and certain sections of the Constitution of Georgia. On argument he claimed violations of the Sixth Amendment and of the Bill of Rights generally. The District Court denied the petition after hearing oral argument but declining to hear evidence upon the facts alleged as to the treatment in Georgia. This appeal followed.

Article IV, Section 2, clause 2, of the Constitution provides:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime."

The Constitution had hardly been adopted when dispute arose over the requirements of that provision. Pennsylvania was the demanding state and Virginia the state of

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[1]This allegation was false on the face of the papers. He was arrested January 5, 1948. A certified copy of an indictment returned against him on February 16, 1948, is among the extradition papers.

asylum in a controversy which went to President Washington, from him to Attorney General Edmond Randolph, and from him to the Congress.[2] On February 12, 1793, an act[3] was approved which became Section 5278 of the Revised Statutes and has remained in effect with minor changes ever since. As it presently appears as Section 3182 of Title 18, United States Code, it reads:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory, to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

In extradition matters in this jurisdiction, the Chief Judge of the United States District Court for the District of Columbia exercises the functions exercised by the executive authority of a state.

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[2]See 2 Moore, Extradition c. II (1891).

[3]1 Stat. 302.

Habeas corpus is the proper process for testing the validity of the arrest and detention by the authorities of the asylum state for extradition purposes. But a petition for a writ for that purpose tests only that detention; it does not test the validity of the original or the contemplated incarceration in the demanding state. The Supreme Court has established the scope of the extradition inquiry and the issues which are presented by it.[4] The state cases and other federal court cases upon the subject are myriad. In essence the rule is that the court may determine whether a crime has been charged in the demanding state, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed.

The question before us is whether a court (either state or federal) in the asylum state can hear and determine the constitutional validity of phases of the penal action by the demanding state in respect to the fugitive or his offense. We think that it cannot do so. Authorities,

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[4]Compton v. Alabama, 214 U. S. 1, 53 L. Ed. 885, 29 S. Ct. 605 (1909); *Ex parte* Reggel, 114 U. S. 642, 29 L. Ed. 250, 5 S. Ct. 1148 (1885); *In re* Strauss, 197 U. S. 324, 49 L. Ed. 774, 25 S. Ct. 535 (1905); Hyatt v. New York *ex rel.* Corkran, 188 U. S. 691, 47 L. Ed. 657, 23 S. Ct. 456 (1903); Biddinger v. Comm'r of Police, 245 U. S. 128, 62 L. Ed. 193, 38 S. Ct. 41 (1917); Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 S. Ct. 291 (1885); Whitten v. Tomlinson, 160 U. S. 231, 40 L. Ed. 406, 16 S. Ct. 297 (1895); Munsey v. Clough, 196 U. S. 364, 49 L. Ed. 515, 25 S. Ct. 282 (1905); Illinois *ex rel.* McNichols v. Pease, 207 U. S. 100, 52 L. Ed. 121, 28 S. Ct. 58 (1907); Drew v. Thaw, 235 U. S. 432, 59 L. Ed. 302, 35 S. Ct. 137 1914).

sound theory government, and the practical aspect of the problem all require that conclusion.[5]

The problem is not merely one of *forum non conveniens*. It involves the interrelationship of governments, both among the states and between the states and the Federal Government. The quoted provision of the Constitution is in the nature of a treaty stipulation between the states, and compliance is a matter of agreed executive comity. In Appleyard v. Massachusetts[6] the Supreme Court said:

"The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several states,—an object of the first concern to the people of the entire country, and which each state is bound, in fidelity to the Constitution, to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the states. And while a state should take care, within the limits of the law, that the rights of its people are protected against

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[5]2 Story Constitution §1809 (5th ed. 1891): "But, however the point may be as to foreign nations, it cannot be questioned that it is of vital importance to the public administration of criminal justice, and the security of the respective States, that criminals who have committed crimes therein should not find an asylum in other States, but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the States, and it will increase the general sense of the blessings of the national government. It will, moreover, give strength to a great moral duty, which neighboring States especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice as it is unexceptionable in its character."

[6]203 U. S. 222, 227-228, 51 L. Ed. 161, 163, 27 S. Ct. 122 (1906).

illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a state to find a permanent asylum in the territory of another state."

While the provision of the Constitution, being specific in its reference to "State," may not apply to the District of Columbia, the same basic theory underlies the federal statute which clearly does apply. Both Constitution and statute are explicit and mandatory. They require—not merely suggest—that the fugitive, having been secured, be delivered to the demanding state.

The law of nations, absent treaties, contemplates that every nation control the entrance *vel non* of persons into its borders; those whom it wishes to stay, stay.[7] Since almost every nation wishes, however, to enforce its criminal laws without nullification by the criminal through the simple expedient of leaving the country, treaties of extradition are general throughout the world.[8] The complete chaos which would have enveloped law enforcement in the American colonies in the absence of extradition agreements became evident long before the Constitution was written. Such an agreement was incorporated in the Articles of Confederation.[9] Without debate it was continued in the Constitution.[10]

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[7]2 Hyde, International Law 1012, 1015 (2 rev. ed. 1945). See also 1 Curtis, Constitution History of the United States 605-606 (1889); 2 Story, *op. cit. supra* note 5, §1808 n. (*a*); 1 Cooley, Constitutional Limitations 52 (8th ed. 1927).

[8]2 Hyde, *op. cit. supra,* note 7, at 1016 *et seq.*

[9]Art. IV, par. 2.

[10]2 Story, *op. cit. supra,* note 5, §1807; 1 Curtis, *op. cit. supra,* note 5, at 601-604; 1 Elliot, Debates 229, 272, 304 (2d ed. 1888).

The Federal Government has no function in this interstate arrangement, except that its courts may see, upon petition for *habeas corpus,* that the states abide the compact; and, of course, its territories must obey the statute. To say that the federal courts may interpose in this process their judgment of the internal processes of the states and the fidelity of their officials to their duties, is to nullify the agreement embedded in the Constitution and to reestablish the rule of the law of nations which it was intended to disestablish. The federal courts have no power to nullify a provision in the Constitution.

Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. Not only state courts but a complete system of federal courts are there.

The basic premise of appellant's position is that he could not get fair treatment in the courts of Georgia, either state or federal. Every argument in support of power in the District of Columbia court to consider and determine whether appellant should be released because of anticipated ill-treatment by executive officers of Georgia comes in the final analysis to the essential proposition that appellant's rights would not be protected by the courts of Georgia. Those courts are there. They are charged with the duty of protecting this prisoner and any other in custody in that state. If they perform that duty, appellant would be as adequately protected by their order as he would be by an order of the court here; he would have no basis for applying to the court here.

We are asked to assume that appellant would not be protected by the courts in Georgia. We not only decline to make the assumption but we repudiate the suggestion that we make it. We will not impugn either the capacity or the integrity of the state courts of Georgia or of any other state. And even if we were to assume, upon the basis of this fugitive's allegations, that the state courts are impervious to his assertions, we would make no such assumption concerning the federal courts having jurisdiction in that state. Those courts of the United States are as capable and faithful as are the courts of this or any other jurisdiction. If that Court of Appeals errs, *certiorari* to the Supreme Court will lie.

If we will not assume the non-availability of courts in Georgia, we are asked to permit petitioner to present evidence upon that non-availability and then to determine the question. There is an established procedure for the correction of error or dereliction on the part of every court in the country, and where constitutional rights are involved the Supreme Court of the United States stands watchman over every court, state or federal. It would be an act of unwarranted arrogance for us to ascribe to ourselves virtue superior to that of other courts and so to assert power to hear and determine the faithfulness to duty of a sister court occupying a place like ours in the federal system. We have not the slightest semblance of authority over such courts. We might differ with them in opinion, but to us the availability of the Georgia federal courts to protect appellant is not "merely a presumption."

Since we have no power to make a presumption or a finding one way or the other upon the virtues or the vices of other Courts of Appeals and since we will not usurp that power, it is of no moment that we should remark

upon the subject. But it seems not inappropriate for us to comment that reported cases show the United States Court of Appeals for the Fifth Circuit to be zealous in protection of the constitutional rights of persons within its borders as is any other Court of Appeals. It was the United States District Court for the Middle District of Georgia which convicted and sentenced to the penitentiary one Screws, a sheriff, for beating a prisoner. The Fifth Circuit affirmed that conviction[11] upon constitutional principles, the Supreme Court reversing[12] on the ground that the statute[13] required a specific intent to deprive a person of a federal right and that an unnecessary beating alone is not sufficient for conviction. It was the same District Court which awarded damages to a Negro voter against the officials of a party primary election for denying the voter the right to participate in a primary, the court holding such deprivation to be a violation of right under the Fourteenth, Fifteenth and Seventeenth Amendments;[14] and the Court of Appeals for the Fifth Circuit affirmed that judgment.[15] It was the same Court of Appeals which, in Crews v. United States,[16] affirming a conviction under the federal statute making criminal a deprivation of constitutional rights under color of law, condemned that statute as "inadequate." The list of cases could be expanded.

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[11]Screws v. United States, 140 F. 2d 662 (1944).

[12]Screws v. United States, 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945).

[13]Sec. 20 of the Criminal Code, 18 U. S. C. A., §52.

[14]King v. Chapman, 62 Fed. Supp. 639 (1945).

[15]Chapman v. King, 154 F. 2d 460 (1946), *cert. denied,* 327 U. S. 800, 90 L. Ed. 1025, 66 S. Ct. 905 (1946).

[16]160 F. 2d 746 (1947).

Appellant cites the authorities which hold that if the facts alleged in a petition for *habeas corpus* are such that, if established, they would require issuance of the writ, he must be afforded oportunity to prove his allegations.[17] We do not deviate from that rule or qualify its unequivocal terms. But, if this appellant proved the facts he alleges in respect to the penal practices of the State of Georgia, he would not be entitled to an order of the Federal District Court in this jurisdiction releasing him from a custody which is for extradition purposes only. This District Court has no power to consider and determine the constitutional validity of executive or judicial processes of the State of Georgia. Another court, not this one, has that power.

It is said that this case presents a conflict between provisions of the Constitution. It presents no such conflict. The extradition clause is a procedural provision. It does not impinge upon any substantive right of any individual and does not affect any provision of the Constitution or its Amendments protecting such rights. The provision of the Constitution[18] which provides that trial for a crime committed in Georgia shall be in Georgia does not impinge upon any constitutional right of criminal defendants in Georgia. If an accused in a federal court in Georgia cannot obtain in that district the fair and impartial trial to which he is constitutionally entitled, he applies to that court, not to some other court, for a transfer of the proceeding. That is the federal rule of criminal

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[17]Walker v. Johnston, 312 U. S. 275, 85 L. Ed. 830, 61 S. Ct. 574 (1941); *In re* Rosier, 76 U. S. App. D. C. 214, 133 F. 2d 316 (1942); Clawans v. Rives, 70 App. D. C. 107, 104 F. 2d 240 (1939).

[18]Art. III, §2, cl. 3.

procedure.[19] That rule does not impinge upon any constitutional right of an accused. No more does the clause of the Constitution which says that a fugitive accused of a crime in Georgia shall be returned there for trial.

The argument pressed upon us on behalf of appellant is susceptible of *reducto ad absurdum*. A fugitive has neither more nor less constitutional rights than has an incarcerated prisoner. If the Georgia courts, state and federal, will not enforce the Constitution as to returned fugitives, they will not do so as to prisoners already in the State. But the rule is settled that *habeas corpus* on behalf of an incarcerated prisoner lies only in the district of his incarceration.[20] If that incarceration be in Georgia, and if we assume, as we are urged to do, that courts in Georgia would not protect a prisoner's rights, we would be compelled to conclude either that prisoners in Georgia cannot get protection or that the rule as to venue of *habeas corpus* does not apply to Georgia. The federal Atlanta penitentiary is in Georgia. If the federal courts there do not enforce the Constitution as to those prisoners, it would seem that the penitentiary ought to be moved, let a federal court in another jurisdiction, in which some federal official might be caught for service of process, order the release of those prisoners.[21]

It is said that under the doctrine urged upon us in behalf of appellant the fugitive would have to establish by adequate evidence that if returned to the demanding state he would be reasonably likely to undergo cruel and unusual punishment or be deprived of some constitutional

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[19]Fed. R. Crim. P., 21.

[20]Ahrens v. Clark, 335 U. S. 188, 92 L. Ed. 1898, 68 S. Ct. 1443 (1948).

[21]See Johnson v. Dye, *infra*.

right. We are asked to follow the lead of the Third Circuit in Johnson v. Dye.[22] We therefore turn to that case to ascertain the nature of the procedure contemplated. The proof there consisted of the testimony of the fugitive himself and that of other escaped convicts and one prisoner incarcerated by Pennsylvania authorities, supported by articles in "Life" and "Time" magazines and the newspaper "P. M." Those witnesses testified that prisoners in Georgia are treated with persistent and deliberate brutality. In so far as "Life" magazine showed that such past abuses had been obliterated, it was contradicted by the witnesses. The State of Georgia offered no testimony. We are told that a similar pattern of presentation is to be contemplated in the case at bar or in other similar cases.

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[22]175 F. 2d 250 (1949). That case was reversed by the Supreme Court (338 U. S. 864 (1949)) without opinion and without dissent, upon a single reference, "*Ex parte* Hawk, 321 U. S. 114." *Ex parte* Hawk contained no reference to extradition. It concerned procedure in *habeas corpus* in the federal court having jurisdiction in the state where the petitioner was indicted, convicted, sentenced and incarcerated. The petitioner there was thus confined in the Nebraska State Penitentiary under sentence for murder imposed by a Nebraska District Court. The *habeas corpus* was sought in the United States District Court for Nebraska. The Supreme Court held that he must exhaust his remedies in the courts of Nebraska. Applying the doctrine of that case to Johnson v. Dye—and to the case at bar—the petitioner would be required to exhaust his remedies in the courts of Georgia before resorting to the federal courts. If the Supreme Court, in Johnson v. Dye, meant that the petitioner must exhaust his remedies in the Pennsylvania courts (where he was being held for extradition only), it meant that those courts had jurisdiction to entertain, and so to grant, his petition upon the grounds he alleged. That would have been a revolutionary reversal of all the cases ever written upon the subject, and we have serious doubt that the Court intended to accomplish that result without argument and without opinion. Rather it seems more reasonable that the Court meant, by citing *Ex parte* Hawk, to tell the petitioner to apply first to the state courts of Georgia which had jurisdiction over the executive officials against whom he was complaining.

That prisoners and fugitives from justice frequently allege beatings and starvation by police or prison officers is demonstrated by reference to almost innumerable cases. Pennsylvania, in the Third Circuit, does not appear to have been immune from these allegations. In Commonwealth v. Brown,[23] a 1933 case, a mulatto boy prisoner claimed that he was denied bread and water for about forty hours and beaten with a blackjack—some 15 or 20 blows—by the Philadelphia police. The trial court ridiculed his evidence as to the brutality, the Superior Court reversing the conviction for that reason. If fugitives from the District of Columbia were to testify in distant states as they sometimes testify in the District Court here, and if they were not contradicted, they would picture frequent and deliberate beatings of prisoners here. Given rein and no prospect of contradiction, and spurred by hope of refuge, fugitives from this jurisdiction would probably describe "revolting barbarities" in the Nation's Capital just as was done in respect to Georgia in Johnson v. Dye, *supra*.

The State of Georgia failed to appear in Johnson v. Dye, and the same situation might reasonably occur in any similar case. In the first place, the Governor of a demanding state may well believe that a United States District Court in some distant district has no jurisdiction to consider and determine the constitutionality of the penal practices of his state. He might decline to concede the contrary or even to appear to do so.

In the next place, the budgets of the state probably do not include funds for the transportation and compensation of lawyers and parties of executive officials to

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[23]309 Pa. 515, 164 Atl. 726.

various distant points to combat the testimony of fugitives as to probable penal treatment of returned prisoners. The interests of the citizens may not, in the opinion of the Governor and the Legislature, justify expenditures in large amounts for such purposes, if the asylum state wants to retain the fugitives. The presence of these persons in their state may not be worth any considerable sum of money to them. Having performed their duty under the Constitution by requesting extradition, with a disclosure of the facts concerning the fugitive, they might be content to let the matter rest there, if the asylum state wishes to grant refuge.

It is conceivable that executive authorities in some states might welcome the establishment of areas of refuge distant from their own responsibility to which undesirables might flee and leave no burden of duty upon their home officials. This possibility is suggested in the concurring opinion in Johnson v. Dye. It is there stated that 175 other prisoners escaped at the same time as did Johnson, that one of the other fugitive witnesses testified that the Warden observed his departure but made no objection, and that the Chief of Police paid his bus fare from Thomasville to Atlanta. Judge O'Connell, in the concurring opinion, observed: ". . . I entertain considerable doubt whether an impenitent Georgia administration would be deeply grieved by a decision which permits Georgia to utilize the other 47 states as penal colonies for its 'escaped' prisoners."[24]

The chaos into which the enforcement of criminal law would be plunged by the doctrine urged upon us by appellant is as readily discernible now as it was when the

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[24] *Supra* at 257.

Colonies first made what is now the existing agreement. The case before us concerns Georgia. The next might concern Alabama. The question there might be whether casually attended, ununiformed laborers with chains attached to their legs, at work in the open air on country roads, are undergoing cruel and unusual punishment. The next case might concern New York or Illinois, and the question might be whether serried, shaved and numbered robots in the monotony of gray walls, or in occasional solitary confinement in darkened cells on bread and water, are suffering cruel and unusual punishment. And so a pattern of opinion in this jurisdiction concerning the penal practices of all the forty-eight states would in time necessarily develop. The authors of the succinct note on "The Third Degree" in the Harvard Law Review[25] say: ". . . one is driven to the conclusion that the third degree is employed as a matter of course in most states. . . ." The same patchwork of return-or-no-return would develop in each of the forty-eight states as to each of the other forty-seven and the District of Columbia, if the courts of each were to determine for themselves the probable penal treatment in each of the others; and the patchwork would include the rules of each of the federal circuits as to each of the states and each of the other circuits.

The resultant confusion is apparent, and the resultant animosity among states and between the states and the Federal Government are as readily discernible. In the case urged upon us as authority, the Governor and the state courts of the asylum state (the trial court and the

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[25]43 Harv. L. Rev. 617, 618 (1930). See also 1 Am. J. Police Sci. 575 (1930).

court of intermediate appeal, where the case ended) refused to free the fugitive. When application for a writ was made to the federal court, they opposed the petition. The federal appellate court, Judge O'Connell commented, "turn[ed] loose a convicted murderer among the law-abiding citizens of Pennsylvania, a state which ha[d] expressly refused to harbor him." The confusion and the animosity which would result from the course urged upon us are compelling reasons why we should not adopt it, just as they were compelling reasons for the provision in the Constitution in the first place.

We find ourselves in disagreement with the United States Court of Appeals for the Third Circuit in its opinion in Johnson v. Dye.

The judgment of the District Court is

Affirmed.

BAZELON, *Circuit Judge,* dissenting: Just as certain rights—those of freedom of speech, press, assembly, religion, etc.—have been said to stand in a "preferred position" under our Constitution, so also would I include within that group the right of the individual to be free from cruel and unusual punishment and to be tried for a crime of which he is accused. The latter is to the individual what the former is to the body politic and both must be the object of zealous concern if our concept of liberty is to be preserved. Accordingly, I am unable to agree that this court is barred from inquiring into charges as grave as those made by petitioner here. In expressing this dissent, I am well aware of the factors of history, policy and precedent underlying the position

of the majority. But I have been cited to no controlling authority in which this particular question—viz., the availability of extradition where there has been cruel and unusual punishment or the denial of a right to trial—has been decided.

The obvious importance of the federal system, and the desire to facilitate its workings, should not obscure the fact that action in pursuance of one constitutional power may run afoul of another. Unless the Constitution is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete disregard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly, the interest of the various governments of our federal system in the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another—one promoting efficiency and comity between states, the other protecting fundamental rights of the individual against state infringement—our system of government will be better served by assessing greater weight to the latter. Serious doubt concerning the effectiveness of future guarantees of such fundamental rights ought not to be resolved by speculation or presumption that somehow, somewhere, but not here, some court will be able to prevent a repetition of past abuses.

Petitioner's allegations below are that he has been subjected to cruel and unusual punishment and that he has been imprisoned for ten months without being brought to trial. For the purpose of this appeal, we are bound to

accept these grave allegations as true. Yet, under the majority view, they may not be considered, regardless of the content petitioner may be able to give to them. Even if petitioner can prove, in a hearing on the merits under these allegations, that he will never get to trial in Georgia, or that he will not get *access* to *any* court in that state because of the cruel and unusual punishment which may cause his death before that time, his release could not be secured on habeas corpus.

This court rests its conclusion in large part on the availability of the Georgia state courts and of the Georgia federal courts to protect petitioner. It thus raises what is merely a presumption—that the law will follow its ordinary course and that officials will act properly—to the level of a conclusive rule of law. It should be clearly understood that I make no assumption that state or federal courts in Georgia will be unavailable. It is the majority which makes their availability an absolute and bars any attempt on the part of petitioner to show the extent of their unavailability. I would treat the regularity of official action as a rebuttable presumption to be tested in the light of facts, rather than by speculation within the bare frame of pleadings. This view does not entail disrespect for the Georgia state or federal courts, nor any doubt as to their capability, integrity or faithfulness to the Constitution and its Bill of Rights. In fact, it makes the majority's reference to such considerations completely irrelevant. It does, however, take account of the notorious facts concerning recurrent penal practices in many of our states, not alone Georgia. It considers the very real possibility that those courts may never have the opportunity to safeguard rights such as those involved here,

that the harm may be done before the judicial process can even be brought into play.

I think we should follow the lead of the Third Circuit in Johnson v. Dye, 175 F. 2d 250 (3 Cir. 1948),[1] at least to the extent that it is based on the premise that allegations such as those involved here may be heard on the merits. In that case, petitioner, who had been convicted of murder in Georgia, sought to resist by way of habeas corpus an extradition warrant issued against him in Pennsylvania. He alleged cruel and unusual punishment inflicted on him in a Georgia chain gang and was permitted to argue on the merits. The court, sitting *en banc,* ordered his release, saying: "* * * the right to

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[1]Reversed per curiam by the Supreme Court in 338 U. S. 864 (1949), citing only *Ex parte Hawk*, 321 U. S. 114 (1944). That case decided that all remedies in the state of detention must be exhausted by one held in the custody of that state before he could petition for habeas corpus in the federal courts. The state there was Nebraska and the attempt was made to get into the federal courts before all Nebraska remedies had been exhausted. The very same question was involved in Johnson v. Dye. There, too, the petitioner in the United States District Court in Pennsylvania had not exhausted his state remedies—*i. e.,* he had not appealed from the decision of Pennsylvania's Court of Common Pleas, affirmed by the Superior Court, to the state Supreme Court. It was because of this very similarity of issues that the Third Circuit devoted a substantial portion of its opinion to an attempt to carve out an exception to the rule of exhaustion of state remedies in habeas corpus. It was this argument which the Supreme Court rejected by its cursory reference to *Ex parte Hawk*. The *Hawk* case had nothing to do with extradition. *It did not involve the question of remedies in a foreign jurisdiction.* To read into a per curiam reversal which is so clearly procedural in origin a repudiation of the substantive decision of the Third Circuit is to depart far indeed from the Supreme Court's obvious meaning. It is as if this court were held to have tested the merits of allegations which it refuses to consider because of a failure to exhaust administrative remedies.

The doctrine of exhaution of state remedies in habeas corpus, designed to prevent premature abandonment of state remedies in search of federal relief, is of course inapplicable here in the District of Columbia.

be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion" [175 F. 2d at 255] and hence was included within the scope of the liberty guaranteed by the Fourteenth Amendment. "The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty" [*Id.* at 256]. I disagree with the opinion of the majority in that case, however, to the extent that it makes the fact of *past* infringement alone the basis of release on a petition for habeas corpus in extradition cases. Instead, I would follow the rationale suggested by Judge O'Connell who concurred in part and dissented in part. He felt that the court "need not, and should not, declare that the drastic remedy [release of petitioner] here announced is one which will lie whenever there has been, in the past, an infliction of cruel and unusual punishment. I deem it sufficient that we invoke our power to release an individual who not only has suffered cruel and unusual punishment but also *faces grave and imminent danger of like abuse and very possibly even death by extra-legal means, if he is returned to Georgia.* If * * * this court must choose between past and prospective violation of a basic constitutional right as the ground for release of an individual, I should prefer to place reliance upon the latter [*Id,* at 258-9]. * * * The logic of invoking the judicial power to eliminate a threatened invasion of a basic constitutional right seems to me irresistible * * *. Could this penalty be served [in Georgia], with observance of those constitutional rights which prisoners retain, * * * I think it would be both unwise and improper for this court to restrain Pennsylvania from honoring a

request by Georgia for his extradition" [*Id.* at 259]. [Emphasis supplied.]

I would remand the case to the District Court for a hearing on the merits, the objective being to escertain whether Johnson has suffered the alleged infringements and "would be reasonably likely to undergo similar abuse if he were returned to Georgia" [*Id.* at 259]. It may well be that petitioner will be unable to prove his allegations or to show such facts as would result in his securing relief. His burden of proof would undoubtedly be great. We might be unwilling to accept the sort of proof relied upon by the Third Circuit and referred to by the majority here. But I cannot bring myself to concur in a view which forecloses all opportunity of showing the extent to which basic rights have been infringed. Unless such an opportunity is afforded petitioner, there can be no accurate assessment of competing constitutional considerations.

It is regrettably true that my view, as the majority quotes from Judge O'Connell's opinion in the *Dye* case, "[might] turn loose a convicted murderer."[2] Nevertheless, I am in thoroughgoing agreement with Judge O'Connell's further statement: "* * * better it be that a potentially dangerous individual be set free than that the least degree of impairment of an individual's basic constitutional rights be permitted" [*Id.* at 257-8].

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[2]In the present case, of course, petitioner was accused of robbery and had not yet come to trial.